91-150

Supreme Court, U.S.
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No. 87-5575-SD

UNITED STATES SUPREME COURT

October Term, 1991

GEMMA LOCKHART, Appellant

-vs-

DARRAL KENOPS, Forest Supervisor,
Black Hills National Forest, United States Forest Service
GARY CARGILL, Regional Forest
Supervisor, United States Forest Service
F. DALE ROBERTSON, Chief,
United States Forest Service
JOHN BLOCK, Secretary of Agriculture,

Defendants/Appellees,

and

VERLA VAN ETTEN,

Intervenor.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT OF APPEALS FOR THE EIGHTH CIRCUIT

GEMMA LOCKHART
Rt. 8 Box 4600
Rapid City, SD 57702
605-342-0413

QUESTIONS

1. DOES DISPOSAL OF LAND BY THE UNITED STATES FOREST SERVICE WITHOUT FAIR HEARING OR OPPORTUNITY TO PRESENT EVIDENCE DENY DUE PROCESS OF LAW?

2. SHOULD THE DISTRICT COURT HAVE ALLOWED PLAINTIFF TO PRESENT EVIDENCE?

All parties to this proceeding are listed in the case caption.

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GROUNDS

Petitioner calls upon this Court with earnest desire, and by the powers of the Great Spirit, to invoke the jurisdiction of this Court to review this matter on the grounds that you can. Opinions sought to be reviewed in Lockhart v. Kenops et.al. include the District Court order of September 18, 1989, granting summary judgment to the government, the March 7, 1991, United States Court of Appeals order upholding the lower court yet remaining silent as to improper summary judgment, and the April 26, 1991, denial of my timely request for rehearing.

Jurisdiction to review this case by Writ of Certiorari is conferred upon this Court by 28 U.S.C. Section 1254 (1). This petition for Writ of Certiorari is timely, filed in accordance with Rule 13 of the Supreme Court Rules 13.1 and 13.4.

LAWS

Constitutional provisions, statutes, ordinances, and regulations violated in this case include NEPA, the Endangered Species Act, 16 U.S.C. 1531-1544, the Bald Eagle Protection Act, 16 U.S.C. 668, 106 of the National Historic Preservation Act, 16 U.S.C. 470f, the American Indian Religious Freedom Act (AIRFA), 42 U.S.C. 1996, the Federal Land Exchange Acts, 16 U.S.C. 485, 486, 516, 521d, 5551; 42 U.S.C. 1715, 1716; 7 U.S.C. 1011, and the First and Fifth ammendments to the federal Constitution.

Also, Rule 56(c) of the Federal Rules of Civil Procedure make clear that summary judgment is not appropriate unless the pleadings, stipulations, affidavits, and admissions in the case "show that there exists no genuine issue as to any material in fact."

OPENING REFERENCE

Gemma Lockhart, representing herself Pro Se, states that she is grateful to the Honorable Richard H. Battey, United States District Judge for the District of South Dakota, The Honorable Circuit Judges Wollman, Heaney, and Magill, and all the judges representing the United States Court of Appeals for the Eighth Circuit, for the time and consideration they have given to this matter.

Further, Gemma Lockhart sends greetings from the Black Hills of South Dakota to honorable members of the United States Supreme Court and their law clerks, and requests you have patience and understanding for her, as she is a humble person and is unable to be represented by an attorney of Law. I appealed to the Eighth Circuit the order of the District Court improperly granting Summary Judgment to the government in an effort to receive fair hearing before disposal of important federal land. In regard to improper granting of Summary Judgment, the Eighth Circuit remains silent. This silence serves a great blow of injustice to Lakota citizens on Dakota land who have been most respectful in disagreeing with Forest Service conclusions regarding

knowledge of the natural world and significance of the parcel in question. Silence of the Eighth Circuit and subsequent denial of rehearing has brought about a treacherous point in time only you can now remedy. I pray you grant this petition for a Writ of Certiorari.

STATEMENT OF THE CASE

The say the male peregrine falcon's love of his cliff is the strongest bond in his life. Even greater than the attachment to his mate. In the mornings in Dark Canyon I hear falcons cry. As I write I realize what the sight of those falcons do for my spirit. The swift hawks are the work of creation. By understanding their beauty and function I appreciate more and more my own creator.

The Winter of 1985 I heard developers were planning to build an elite housing development on the high cliff and falcon home. Since before the late 1800s, when this parcel became Forest Service land, it was a place of Lakota prayer. It remains a place of Lakota prayer today. And this land is a favorite Winter spot of the Bald Eagle. He likes to fish open places in the creek below. The Forest Service planned to dispose of the 100-acre parcel by way of a land exchange.

On Valentines Day, 1985, my father, my sister, and myself sat down to inform the Agency in writing of the environmental and cultural harm they would cause if they continued with plans to dispose of this place. We rightfully asserted disposal of the land and development would adversely affect the air, water, and soil,

would harm life, including endangered and threatened species, and would interfere with Indian religious ceremonies. I cannot believe and do not want to believe the actions of the Agency that followed.

The record will show a continuous string of blunders and remands of Agency decisions from the Chief of the Forest Service to the Regional Forester regarding environmental and cultural matters which raise issues of material fact, evidence as to which have yet to be received and considered on the merits by any Court.

On June 4, 1951, the Bureau of Land Management, Department of the Interior, pursuant to statutory authority, authorized Public land Order 725 which classified the one hundred (100) acre parcel as reserved for public use and withdrew it from the laws of the National Forest so as to give it reserve status. This made it illegal for the Government to dispose of the property by land transfer.

September 22, 1982, while PLO 725 was in full effect Verla Van Etten requested to acquire the high cliff area for purposes of building an upscale housing development, through the land exchange process. At this time PLO 725 made it illegal to do so. The Forest Service and the Van Etten's proceeded in an effort to

accomplish the proposed Van Etten land exchange.

As the Eighth Circuit in Lockhart v. Kenops, 927 F.2d 1028 at 1031 (1991), the first Environmental Assessment prepared by the Agency approved the exchange in "concept only", with final approval expressly conditioned on completion of studies of cultural and mineral resources, with a finding that they would not be significantly affected. Note that early in the administrative process of this illegal land exchange, the Agency itself expressed a need for study of cultural resources of this parcel of land.

Appraisal inequities required Van Etten's to offer additional land for the trade. On January 3, 1985, the Regional Forester approved a revised EA, again concluding the exchange would have no significant impact on the environment, and no EIS need be done. (App. Vol. I, tab 2) At this time, Dr. Donald Van Etten made public his plans to build luxury homes on the canyon ridge.

On or about February 14, 1985, myself and others appealed the decision to the Forest Service pursuant to 36 C.F.R. and 211.18. We rightfully stated disposal of the land for development would adversely affect the air, water, and soil, would harm wild life, including endangered and threatened species, and would interfere

with Indian religious ceremonies.

Thereafter, on June 7, 1985, E. Max Peterson, the chief of Forest Service remanded the matter to the Regional Forester expressing various concerns including lack of discussion of environmental impact and cultural resources discussion. A Supplemental Environmental Analysis was issued on July 9, 1985. This was followed by appeals (August 21 and 22, 1985) and a further remand by the chief (September 2, 1985). The Regional Forester was directed to respond to specific inquiries. A brief (2 1/ 2 pages) Environmental Assessment Update was thereafter issued.

On May 7, 1987, in absence of the ordered response, Dale Robertson, the new Chief of the Forest Service, approved the exchange. On June 1, 1987, the Secretary of Agriculture declined to review that determination.

However, since PLO 725 remained in place and protected the high cliff area for public use, the exchange could not properly be approved. The decision to approve the land transfer of the parcel was without legal authority.

The injunction issued in National Wildlife Fed'n v. Burford, 835 F.2d 305 (D.D. Cir. 1987), kept the Government from lifting

PLO 725. Also, I requested that the Bureau of Land Management give me an opportunity to have public input before they would act to change classification of the land in question. This request was sent by certified, return receipt requested United States mail. This request was denied.

On August 4, 1987, myself and others filed this action asserting violations of Constitutional provisions, statutes, ordinances and regulations cited above. The action sought declaratory and injunctive relief to prevent the Forest Service from proceeding with the exchange unless and until the cited statutes were complied with. Both parties stipulated to a stay because of PLO 725 and the injunction in Burford.

November 4, 1988, the D.C. Circuit vacated the Burford injunction. Six months later with notice only by way of microscopic printing in the Federal Register, PLO 725 was revoked.

The revocation became effective May 25, 1989.

July 5, 1989, the District Court granted a temporary restraining order (TRO) prohibiting the exchange, but requested fifty thousand ($50,000.00) dollars bond by Plaintiffs. Plaintiffs were willing to

post bond, but could not immediately, because of joint ownership of land to be used as collateral, and logistics of gaining proper signatures from across the United States. When bond was not immediately posted, the Court lifted the TRO and allowed the exchange subject to the requirement that Van Etten not cause "any physical change or destruction of the environment or property" until the case was over.

July 7, 1989, the exchange occurred. Title of the high cliff area was issued to Van Etten.

September 18, 1989, the District Court granted Summary Judgment to the Government.

September 10, 1990, I filed an appeal to the Eighth Circuit Court of Appeals which upheld the District Court in it decision filed March 7, 1991. I made a timely request for rehearing. The Petition as to both Rehearing En Banc and Rehearing by the Panel was denied on April 26, 1991.

ARGUMENT

A. SUMMARY JUDGMENT WAS NOT APPROPRIATE

Standards Of Summary Judgment

Material facts in this case differ greatly depending on whether you listen to the Government Agency or the voices of individuals with unique knowledge of the land based upon daily observation for five generations of time.

There are many disputed issues of fact. Thus, it was improper for the District Court to grant Summary Judgment.

The Eighth Circuit within its opinion does not discuss application of standards of Summary Judgment and seems to address the question of whether there is support for the Agency action without considering first whether there existed genuine issues of material fact and, if so, whether the District Court provided Plaintiff an opportunity to present evidence upon which the Court might make finding of fact.

The District Court below cited Adickes v. S.H. Kress and Co., 398 U.S. 144 at 157, as authority for the applicable standard in making its determination to grant Summary Judgment under Rule 56(c) of the Fed.R.Civ.P. to the Defendants. In Adickes, supra,

this Court made clear that the moving party had the burden to show the absence of a genuine issue of material fact. Further, this Court in Adickes noted that a District Court is

> "required to view the facts in the light most favorable to the party opposing the motion and to give that party the benefit of all reasonable inferences to be drawn from the underlying facts disclosed in the pleadings and affidavits." Ibid, at 158-159.

In the instant case, the Defendants/ Appellees were not required to explain the several mysteries surrounding their failure to find facts regarding environmental impacts. Rather, the District Court consistently placed the burden on Plaintiffs/Appellants, the non-moving Party, to bring such facts forward, and when Plaintiffs/Appellants complied in filling in evidentiary gaps, the substantial evidence presented was considered by the Court as marginal. But if the facts were viewed in the light most favorable to Plaintiffs/Appellants, they plainly show a likelihood that Defendants/Appellees acted in an arbitrary and capricious manner in reaching their findings, or acted in an unreasonable manner in deciding not to prepare an EIS. The controversy is genuine and

substantial. See, Roberts v. Browning, 610 F.2d 528, 531 (8th Cir. 1979).

The District Court cites Roberts as authority for its employment of Summary Judgment as a mechanism of judicial efficiency. But Roberts also warns that "summary judgment is a harsh remedy and should be granted sparingly." Id. 610 F.2d at 531.

In its analysis of this case, the Appellate Court gets carried away with separate disciplines of law and overlooks the relationship they have to each other and to the Court. I wish when the Supreme Court considers this case, it would think more broadly than a single law allows. The nature of this case requires you to be a universalist, to consider the facts and circumstances of this case over time, and through time.

B. ISSUES RAISED BY THE AGENCY HEAD REMAIN UNRESOLVED

The Chief of Forest Service, R. Max Peterson was not satisfied with the Environmental Assessment performed as to this project and twice remanded for greater analysis. (App. Vol IIA, tab 12 & App. Vol. III, Doc. 39) In his Decision and Remand of September 2, 1986 he ordered the Regional Forester "to specifically address

the direct effects of Van Etten's proposal on the soil, water, and air quality on and in the vicinity of the parcel." (App. Vol. III, Doc. 39) (emphasis added). The Regional Forester was further ordered to "either update the EA or commence to do an EIS." Ibid. He did neither.

November 4, 1986, the Regional Forester issued another addition to the EA. This one was called an Environmental Assessment Update (EAU) (App. Vol. III, Tab 44) purportedly addressing concerns of Chief Peterson, but, as the Appellate Court chooses to describe it, "albeit not in great detail." Lockhart at 1031.

Former Chief Max Peterson outlined a series of questions that must be answered before approval of the exchange could be reconsidered. Only some of these questions were addressed in the EAU approved by the new Chief who replaced Peterson. The issues unaddressed and unanswered remained at the time of approval.

The Chief, in his September 2, 1986, letter requested that the Regional Forester address the direct environmental impacts on soil, water, and air quality studies which were never performed in

response to his order. The Chief also directed that the questions of the indirect effects on aesthetics, highway traffic and forest fires be addressed. Studies in response to this request were never done.

This 2-1/2 page Environmental Update (App. Vol. III, Tab 44) submitted by the Regional Forester contained brief conclusory paragraphs on each subject, demonstrating that no new research had been accomplished.

Rather, the individual signing the "Environmental Assessment Update" for the Regional Forester states that his primary source was a report entitled "Engineering Geology of Annamon Ridge" (App. Vol. III, Exhibit 1). This report, written by a biologist and an engineer, does not even purport to address each of the areas of concern identified by Chief Peterson.[1] Significantly, whatever contribution the document makes is not new. The report was issued prior to the directive of Chief Peterson.

Here, even discounting all of Plaintiff's evidence, issues of material fact were shown to exist based upon the discrepancies and omissions cited by the Chief of Forest Service and not responded

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1. For example, the Eighth Circuit notes that "according to the study there seems to be no safe way to disperse of sewage for four of the lots (Lockhart at 1033).

to within the record. This alone should have precluded Summary Judgment as genuine issues of material fact as defined by the Agency's top decision maker himself remained.

C. ENDANGERED AND THREATENED SPECIES

The Endangered or Threatened Wildlife Biological Evaluation of the proposed Verla Van Etten Land Exchange Supplemental Report dated January 13, 1986, (App. Vol. IIA, Doc. 18) shows three confirmed sightings of Peregrine Falcons in the Black Hills National Forest.

1. June 18, 1948, One occupied nest, Pennington County, Dark Canyon, West of Rapid City; observed by Dilger.
2. July 6, 1956, Pair, Pennington County, Dark Canyon, nest occupied; observed by Whitney Eastman.
3. August 13, 1960, One nest, Pennington County, Dark Canyon, nest of unfledged juvenile banded by N.R. Whitney, found by James Lockhart; observed by Whitney.

Because of this, Forest Supervisor James Mathers wrote a letter to the Regional Forester on September 7, 1978. (App. Vol. IIA, Doc. 18) (See also Appendix 6.)

This document determines that Dark Canyon is an essential habitat for the Peregrine Falcon in the Black Hills National Forest. Mathers points out Dark Canyon cliffs offer a dominating view of the canyon. There are pot holes and ledges present to provide necessary nests for Peregrine Falcons. There is abundant prey, and Dark Canyon is the last historic nesting site of Peregrine Falcons in the Black Hills.

This document is especially valuable for the Court because it comes before Verla Van Etten's request to acquire the Dark Canyon land. It was prepared without bias.

Other reports and affidavits of recent sightings in the record contradict Forest Service conclusions of the absence of falcons and show that they still exist and choose to nest in cliffs at the site in question.[2]

A serious dispute therefore exists as to material facts exists as to the sufficiency of the studies regarding the potential impact of

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2. See, Affidavit of Sandra Reub, August 5, 1987, (including attached February 7, 1986, letter in response to Schenck's January 13, 1986, "Supplemental Report) 8/App. Vol. V. Doc. 32: Affidavit of Gemma Lockhart, August 22, 1987 (including attached August 22, 1985 Statement of Reasons, p. 8, and march 6, 1986 Reply to Responsive Statement, p. 112-13) App. Vol. V., Doc. 4); Affidavit of James W. Lockhart, August 5, 1986 (including attached letter of March 3, 1986) (App. Vol. V., Doc. 6).

the proposed project on endangered species, upon which the finding of "no significant impact" was made.[3] Endangered species do exist and inhabit the area the Forest service seeks to dispose of. All reports relied upon by the Agency concluded there would be no impact on endangered species, and put forth bogus conclusions. Falcons clearly do exist in this last known habitat in the Black Hills. Statements of citizens making sightings were ignored.

Your Honors, please look carefully at the record in this case.

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3. In reviewing an Agency decision regarding the development of land, a District Court "must determine whether the Agency has provided convincing reasons why potential impacts are truly insignificant." Foundation on Economic Trends v. Weinberger, 610 F.Supp. 829, 837-838 n.8 (D.D.C. 1985) [quoting, Maryland-National Capital Park and Planning Comm'n v. United States Postal Service, 487 F.2d 1029, 1040 (D.C. Cir. 1973)]. The record must show that the Agency satisfied NEPA requirements of being "fully informed about" and making "well-reasoned judgments regarding the environmental effects of their proposed actions." Olmstead Citizens For A Better Community v. United States, 793 F.2d 201, 204 (8th Cir. 1986). At a bare minimum, the record must indicate that the Agency took a "hard look" at the environmental consequences of the proposed action. Kleppe v. Sierra Club, 427 U.S. 390, 410 n.21, 96 S.Ct. 2718, 2730 n.21 (1976).

The record in this case does not support a finding that the Forest Service reasonably fulfilled its obligations under NEPA and other applicable statutes. The record is completely devoid of any indication that the Forest Service conducted a proper "context" or "intensity" analysis as to the potential impact, long- or short-term, of the contemplated use of the public land on Plaintiff's adjacent land and Rapid Creek. 42 C.F.R. 1508.27.

As the Ninth Circuit expressed in Sierra Club v. Clark, 774; Agency action must be considered "arbitrary and capricious" if the Agency "entirely failed to consider an important aspect of the problem" or "offered an explanation for its decision that runs counter to the evidence before the Agency." Ibid., 774 F.2d at 1410 [citing, Motor Vehicle Mfrs. Ass'n. v. State Farm Mutual, 463 U.S. 29, 43, 103 S.Ct. 2856, 2867 (1983)].

Material facts differ greatly depending on whether you listen to the Government Agency or the voices of individuals with unique knowledge of the significant land.

D. CULTURAL RESOURCES

Forest Service concluded that the proponent's planned housing development will have no effect on cultural (and presumably historic) resources, since no sites eligible for inclusion on the National Register of Historic Places were found by Overland Associates, Inc., in their 1983 survey. Admin. Rec. (App. Vol. IIA, Doc. 1, Exhib. 7). Since such sites clearly exist, the Survey upon which the Forest Service relied for its finding of "no significant impact" was factually flawed. The District Court's deference to this study, without considering that other reliable evidence raised a substantial number of unanswered questions, was misplaced.

Overland Associates states at Sec. 5 of their report that the Archeological Research Center at Ft. Meade, South Dakota, and the Black Hills National Forest Cultural Atlas revealed that the 100 acre tract of public land in issue had <u>never</u> been surveyed.

The Overland Associates "field reconnaissance" was insubstantial. For example, a mine quarry which dates from 1909 is clearly visible on the 100 acres, on the cliff wall of the southern part of the public land. This is established by the Supplemental Affidavit of James Lockhart, together with photographs and a 1945 local newspaper article attached thereto. (App. Vol. 4 Doc. 7). It is hard to understand how anyone who looked could have missed this historic quarry, from which much of early Rapid City was constructed.[4][5]

Nevertheless, the District Court viewed the Affidavit and attachments only as "some marginal evidence that the findings of the report were inaccurate" (Lockhart v. Kenops, slip opinion, Civ. 87-5076, p. 13, D.S.D. Sept. 1989) and the Eighth Circuit ignored this evidence altogether.

Fully one year before the exchange occurred, the National Advisory Council on Historic Preservation reviewed the Forest Service's determination that this exchange would have "no effect" on historic properties; This review was conducted pursuant to 36

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4. According to the Overland Study, such sites would be "high" on the eligibility potential for inclusion in the National Registry of Historic Places.

5. See, 5/16/86 Letter form Dr. King (App. Vol. V, Doc. 17).

CFR & 800.6 (e)(2). The Forest Service was advised to carry out additional identification efforts recommended in the Council's analysis. Specifically, the Forest Service was advised to comply as needed with 36 CFR 800.4 (c) et. seq. (Letter and analysis attached for your review as Appendix 7).

E. INDIAN RELIGIOUS CONCERNS

The First Amendment of the Constitution was not written for Indians.

> "The Constitution of the United States did not recognize Native Americans as full participants in the government that replaced all the colonies in their struggle for independence. The Declaration of Independence was not made to include the American Indians. Remarkable as the Founding Fathers were, they were not broad enough to gather the whole of the human family into the provisions of this document...However, as time has passed, provisions were made to include all people regardless of their culture. America is for all people." Zvern, Ted, Address, University of Wisconsin, Spring 1990.

This is important to keep in mind. It is especially important to understand in light of the American Indian Religious Freedom Act 42 U.S.C. §1978. Thirteen years ago, Congress understood that if Native Americans were to have the same freedom of religion promised to and written for the rest of U.S. citizens in the First Amendment, special factors must be taken into consideration. Fairness required it. Cultural differences mandated it.

To my knowledge, there is not one member of this Court who is deeply involved with American Indian people. In fact, you are a group of people feared by most Indian scholars in the Nations for what you have done, and what Indian people anticipate you will do to wipe out what few protections remain for the indigenous people who gave almost all they had that America may be a great nation. The Supreme Court must hold a deep obligation to Justice to consider the needs of these people. You must go out of your way to understand and consider the needs of the American Indian.

For instance, let me speak briefly about what I believe. The matter of religion is a matter of spirit. When I was a young girl, Ben Black Elk spoke to me. Not the old man, Black Elk, who helped with the book Black Elk speaks, but his son, Ben. The one

who used to sit at Mount Rushmore and speak to visitors who came to the Shrine to Democracy. Ben Black Elk said:

> "Always remember what I am going to say. Never forget. The Spirit World will speak to you if you know how to listen in the right way. This means you must listen to the plants. You must listen to the animals, and you must listen to the bugs. Always listen to your elders. And always listen to what the children are saying. If you do these things, everything you need to know is in yourself."

I share this with you so that you may understand, that to the Lakota mind, the natural world is the way the spirit or religious world communicates itself. Whether you believe it or not does not matter. That you understand, I believe, is imperative. You are the ones who have been entrusted with the judicial responsibility to guarantee my right to Indian religion.

Additionally, if one listens to what the old people say, one understands the significance or meaning of certain animals in nature connected to religion or belief. The old people believe the presence of an animal is not without the presence of the spirit it presides over. Two examples I am free to speak of are the eagle

and the hawk. They say the spirit of the hawk presides over swiftness and endurance. The old people say the spirit of the eagle presides over hunting, battle, and counsel.

The Forest Service pretended they spoke to our elders regarding the subject lands. They did not. The Eighth Circuit at Footnote 7 at 1036 notes that the Forest Service "summary of a conference with Indian spiritual leaders states that the Van Etten exchange was discussed. Whereas, the transcript of the conference shows that it was not." While the Eighth Circuit finds this to be "legally irrelevant," this agency misrepresentation calls into question the basis, integrity, and accuracy of its findings, thus raising factual issues that the Court should have resolved only after an evidentiary hearing.

An understanding of Lakota belief offers the Court a more intimate view of the importance and relevance of culture in regard to the violations of National Environmental Policy Act 42 U.S.C. §4321-4370, the First Amendment of the U.S. Constitution, and American Indian Religious Freedom Act. Please be willing to consider my religious belief and my environmental concerns, their relationship to each other, and their relationship to you.

You must recognize the rights of Indian people to pray and to have a philosophy different from your own. It is hard to imagine a people more contrary or opposite to the European ancestors who have settled here. Indians are diverse in their way of learning, in philosophy, and knowledge of life. We are not a thing of the past. We are a growing population and request that you recognize our rights to these things.

As you well know, I am not an attorney, but Lyng v. Northwest Indian Cemetery Protective Association 485 U.S. 439 (1988) S.Ct. does not apply to this case. This case is not about government use of land or government management of land. This case is about government disposal of land where Indian ceremonies have long taken place and continue today. This case is about the wintering place of the great Bald Eagle, and it is about the long standing and well documented home of the magnificent and endangered Peregrine Falcon. At the heart of it all lies improper summary judgment and the integrity of the legal process which you safeguard.

F. PETITIONER WAS WRONGFULLY EXCLUDED FROM THE COURTS

It would seem the job of the District Court would be to hear evidence and testimony to substantiate citizen statements when they differ so greatly from government findings and conclusions.

The Eight Circuit states that "(w)hile the Forest Service conclusion may not be undisputed, it is certainly not unsupported by the evidence." (Lockhart at 1034) Here the Circuit seems to forget that the District Court made its determination upon summary judgment. If evidence exists to support the challenge to the Administrative action, Plaintiff should have the opportunity to establish through an evidentiary hearing that the action by the Agency was arbitrary and capricious.

The Eighth Circuit Court of Appeals reviewed this matter as if it had been determined in District Court based upon receipt of evidence at trial. There was no trial.

The Eighth Circuit erred in affirming dismissal as Plaintiff demonstrated a prima facia case. The threshold for showing prima facia case is far below that which is necessary to prevail upon hearing. The Plaintiffs submitted sufficient evidence to require this case to go to trial. A prayer comes to you from the Black Hills

of South Dakota. Please grant this citizen's petition for a Writ of Certiorari.

July 24, 1991

Respectfully submitted



Gemma Lockhart
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605-342-0413

APPENDIX

1. Sept. 18, 1989 Judgement of District Court
2. Sept. 18, 1989 Memorandum Opinion of District Court.
3. March 7, 1991 Opinion of Eighth Circuit Court of Appeals
4. April 26, 1991 Denial of Rehearing by Eighth Circuit Court of Appeals
5. Feb. 14, 1985 Statement of Appeal Reasons to Forest Service from Gemma Lockhart
6. Sept. 7, 1978 letter of James Mathers identifying Dark Canyon as Essential Habitat for the Peregrine Falcon.
7. July 26, 1988 Letter of Tom King, President, National Advisory Council on Historic Preservation, analysis and advice to Forest Service to comply with law.

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

WESTERN DIVISION

JAMES LOCKHART, GEMMA LOCKHART, SANDRA REUB, AMERICAN INDIANS AGAINST DESECRATION,	)	CIV. 87-5076
Plaintiffs,	)	
vs.	)	
DARREL KENOPS, Forest Supervisor, Black Hills National Forest, United States Forest Service; GARY CARGILL, Regional Forest Supervisor, United States Forest Service; F. DALE ROBERTSON, Chief, United States Forest Service; JOHN BLOCK, Secretary of Agriculture,	)	JUDGMENT
Defendants.	)	
and	)	
VERLA J. VAN ETTEN,	)	
Intervenor.	)	

Pursuant to the memorandum opinion issued September 18, 1989, it is hereby

ORDERED that judgment shall be entered in favor of defendants and intervenor and against plaintiffs.

IT IS FURTHER ORDERED that plaintiffs' action is dismissed without prejudice.

IT IS FURTHER ORDERED that plaintiffs shall pay costs in the amount of $_____, such costs to be hereinafter taxed and inserted by the Clerk.

Dated this 18th day of September, 1989.

BY THE COURT:

_____
RICHARD H. BATTEY
UNITED STATES DISTRICT JUDGE

ATTEST:

WILLIAM F. CLAYTON, CLERK

By_____
Deputy Clerk

(SEAL)

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

WESTERN DIVISION

JAMES LOCKHART, GEMMA LOCKHART, SANDRA REUB, AMERICAN INDIANS AGAINST DESECRATION,	)	CIV. 87-5076
Plaintiffs,	)	
vs.	)	
DARREL KENOPS, Forest Supervisor, Black Hills National Forest, United States Forest Service; GARY CARGILL, Regional Forest Supervisor, United States Forest Service; F. DALE ROBERTSON, Chief, United States Forest Service; JOHN BLOCK, Secretary of Agriculture,	)	MEMORANDUM OPINION
Defendants.	)	
and	)	
VERLA J. VAN ETTEN,	)	
Intervenor.	)	

NATURE AND PROCEDURAL HISTORY

In 1985 plaintiffs began an attempt to block a proposed 100-acre land exchange between the United States defendants and Verla J. Van Etten, intervenor. The administrative action resulted in a four-volume record and a decision that the proposed land exchange be completed. Plaintiffs filed this action August 4, 1987. The action was stayed on July 1, 1988, when the parties entered into a stipulation which acknowledged that Public Land Order (PLO) 725 withdrew the lands from disposition and that an injunction issued by the D.C. Circuit Court of Appeals in Nat'l Wildlife Fed'n v. Buford, 835 F.2d 305 (D.C. Cir. 1987) enjoined the government from revoking the withdrawal. On November 4, 1988, that court vacated its injunction in Buford and on May 29, 1989, PLO 725, as it affects the land which is the subject of this lawsuit, was revoked. On June 15, 1989, defendants announced their intent to again transfer title to such property and plaintiffs renewed their suit. Fifteen days later one of the plaintiffs, with others not party to the action, submitted

a special use permit application to permit the placing of a small log structure on the land. Plaintiffs then sought, and on July 5, 1989 received, a temporary restraining order prohibiting the land exchange contingent upon the plaintiffs' posting a $50,000 bond. When plaintiffs failed to post the bond this Court lifted the TRO on July 10, 1989, and permitted the exchange, but directed that the intervenor "refrain from causing any physical change or destruction of the environment or property subject to this lawsuit." Such restraint wa fashioned by the Court upon a determination made that the intervenor would be able to proceed with development plans without the immediate necessity of harming the environment. A patent was issued to the intervenor on July 7, 1989, and delivered to the intervenor after the order by this Court allowing the exchange. On file are cross motions for summary judgment.

FACTS

The property at issue in this suit is 100 acres of what was previously Forest Service land in the Black Hills of South Dakota commonly known as the Dark Canyon Overlook. This land was exchanged for almost 240 acres of land also in the Black Hills which had been owned by intervenor Verla Van Etten. Intervenor has made known her plans to develop and sell approximately twelve to sixteen exclusive home sites on the Dark Canyon Overlook property. Other facts which go to the decision by the Forest Service whether to exchange the land are found in the administrative record and in the affidavits submitted by the parties. These facts go to the heart of the case and are determinative of whether the agency action was proper. They will be looked at in the discussion.

STANDARD FOR SUMMARY JUDGMENT

Rule 56(c), Federal Rules of Civil Procedure, provides that summary judgment shall be rendered if the

"pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." In ruling on a motion for summary judgment, it is the Court's obligation to view the facts in the light most favorable to the adverse party and to allow the adverse party the benefit of all reasonable inferences to be drawn from the evidence. Adickes v. S.H. Kress & Co., 398 U.S. 144, 157, 90 S. Ct. 1598, 1608, 26 L. Ed. 2d 142 (1970); Inland Oil and Transport Co. v. United States, 600 F.2d 725, 727-28 (8th Cir.), cert. denied, 444 U.S. 991, 100 S. Ct. 522, 62 L. Ed. 2d 420 (1979).

If there is no genuine issue about any material fact, summary judgment is proper because it avoids needless and costly litigation and promotes judicial efficiency. Roberts v. Browning, 610 F.2d 528, 531 (8th Cir. 1979); United States v. Porter, 581 F.2d 698, 703 (8th Cir. 1978). The summary judgment procedure is not a "disfavored procedural short-

cut." Rather, it is "an integral part of the Federal Rules as a whole." Celotex Corp. v. Catrett, 477 U.S. 317, 106 S. Ct. 2548, 2555, 91 L. Ed. 2d 265 (1986). Summary judgment is appropriate against a party who fails to make a showing sufficient to establish that there is a genuine issue for trial about an element essential to that party's case, and on which that party will bear the burden of proof at trial. Id. 106 S. Ct. 2553. See also Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S. Ct. 2505, 2511, 91 L. Ed. 2d 202 (1986); Jordan v. Hanks, 683 F. Supp. 1298, 1299 (W.D. Mo. 1988).

DISCUSSION

1. Plaintiffs' Motion for Summary Judgment.

Plaintiffs' request for summary judgment is denied. Plaintiffs' argument rests on the assumption that the Dark Canyon Overlook property was withdrawn by PLO 725 and that this order was never revoked. In fact, PLO 725 insofar as it affects the 100 acres which is the subject of the suit, has

been revoked. See 43 C.F.R. PLO 6728, cited in 54 Fed. Reg. 78. Also, the special use permit application submitted by plaintiff Gemma Lockhart can only be considered after resolution of the land exchange issue which was pending long before such application was made. The special use permit application applies to the 100-acre tract, but only if it should remain Forest Service land. The Court holds that it does not so remain; accordingly, the Court need not address the issues raised involving the special use permit application.

2. Defendants' Motion for Summary Judgment.

Defendants' argument that the issuance of the patent solves any defects is without merit. It simply does not make any sense whatsoever to say that the very action by which this Court allowed the patent to be issued while the case was pending gives the defendants the means to have the case dismissed. The government correctly states in its reply that under the Administrative Procedure Act (APA) a reviewing court can preserve status or rights pending conclusion of the

review proceedings. 5 U.S.C. § 705. This Court stands in the position of a reviewing court and will choose to preserve the rights of the plaintiffs until the case is disposed. See Nat'l Forest Preservation Group v. Butz, 498 F.2d 1314 (8th Cir. 1974) (en banc). Consequently, this Court must look to the facts and record produced to determine if the administrative decision was or is not reasonable as a matter of law.

The scope of judicial review has been set by the Supreme Court in Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 91 S. Ct. 814 (1971). If the agency acted within the scope of its statutory authority it must be determined whether the agency choice was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." Id. at 414, 415. Procedural requirements must also be met by the agency. Id. at 417. This circuit has further stated that "agency action is arbitrary and capricious only where it is not supportable on any rational basis." Brotherhood of Ry. & Airline Clerks v. Burlington Northern, Inc., 722 F.2d 380, 381 (8th Cir. 1983). This Court

considers the claims of plaintiffs to determine if the findings of the Forest Service could have been arbitrary or capricious as a matter of law.

A. FEDERAL LAND EXCHANGE ACTS

1. Requirement of Finding of Public Interest. Plaintiffs contend that there is a factual issue as to whether the exchange is in the public interest as required by the Federal Land Policy and Management Act, 43 U.S.C. § 1716. This statute has been found to be reviewable by at least one court in an appeal of an administrative decision because of the specific criteria which must be applied to make such a finding of public interest. Nat'l Coal Ass'n v. Hodel, 617 F. Supp. 584 (D.C. Cir. 1985) aff'd 825 F.2d 523 (D.C. Cir. 1987). As in that case, it is clear here that the Secretary did in fact consider the issues set out in section 1716 and came to the conclusion that the exchange is in the public interests. This finding of public interest which cannot be said to be

arbitrary or capricious also negates any argument made by the plaintiffs that a fractioned mineral interest can block the exchange. Nearly the entire record is geared toward a finding that this action must be in the public interest. Examples of the Forest Service findings are documents in the Environmental Assessments, Responsive Statements, and Administrative Decisions. See, e.g., Environmental Assessment, p.2 (Administrative Record, Volume 1, Tab 1), Responsive Statement, (Administrative Record, Volume 1, Tab 24), Environmental Assessment Supplement, p.9 (Administrative Record, Volume 2A, Tab 1), Regional Forest Service Responsive Statement pp. 11-12 (Administrative Record, Volume 2A, Tab 1), letter from Chief of Forest Service (Administrative Record, Volume 3, Tab 49).

Other statutes cited by the plaintiffs, 16 U.S.C. §§ 485, 486, 516, 521(d), 555(a), 7 U.S.C. § 1011, and 43 U.S.C. § 1715, do not afford plaintiffs their requested remedy. In such statutes there is either no requirement of a finding of public interest or such decision is committed to agency

discretion by express wording of the statute and needs no further discussion.

2. A Requirement of Equal or Equalized Valuation. Under 43 U.S.C. § 1716, lands to be exchanged are to be equal in value or equalized by a payment not to exceed the lesser of 25 percent of the value of the land being transferred out of federal ownership or $15,000. The plaintiffs' allegations of unequal value fail under their summary judgment burden in the face of in depth appraisals by the government on this issue. Administrative Record. Volume IV, Tabs 9-13. Plaintiffs cite only the statute requiring the equal value rule. Plaintiffs have not raised any issue to show that the decision of the agency was arbitrary or capricious.

B. BALD EAGLE PROTECTION ACT AND THE ENDANGERED SPECIES ACT

Plaintiffs contend that the land exchange violates 16 U.S.C. §§ 688 and 1531-1544. The Bald Eagle Protection

Act[1] does not apply to this case. It establishes civil and criminal penalties for those who take, or place in the market, any bald eagle. By its own terms it does not apply to this action as the land exchange can in no way be considered a taking of a bald eagle.

The Endangered Species Act, 16 U.S.C. §§ 1531-1544, does apply to government actions, however. It provides that all federal departments and agencies must seek to conserve endangered species and that any action by an agency shall not jeopardize the continued existence of any

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[1]The Bald Eagle Protection Act, 16 U.S.C. § 668, states in part as follows:

> Whoever, within the United States or any place subject to the jurisdiction thereof, without being permitted to do so as provided in this subchapter, shall knowingly, or with wanton disregard for the consequences of his act take, possess, sell, purchase, barter, offer to sell, purchase or barter, transport, export or import, at any time or in any manner, any bald eagle commonly known as the American eagle, or any golden eagle, alive or dead, or any part, nest, or egg thereof of the foregoing eagles, or whoever violates any permit or regulation issued pursuant to this subchapter, shall be fined not more than $5,000 or imprisoned not more than one year or both . . . .

endangered species or result in the adverse modification of their critical habitats as defined by the act and set out in 50 C.F.R. §§ 17.95, 17.96, and 226. 16 U.S.C. § 1536. The land which is subject to the exchange in this case, however, has not been found to be critical habitat for either the bald eagles or peregrine falcons. See Administrative Record, Volume 2A, Tab 18-5, p.6, Tab 18-4, p.9. Furthermore, there is ample evidence in the record that the proposed exchange will not be likely to jeopardize the continued existence of either species and insufficient evidence was raised by the plaintiffs to rebut this evidence.[2] All evidence raised by plaintiffs was considered by the agency. See Administrative Record, Volume 2A, Tabs 18-4, 18-5, 18-6. The Fish & Wildlife Service has concurred in the findings of these reports. See Administrative Record, Volume 1, Tab 24, p.8. This Court finds as a matter of law, therefore, that

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[2]The supplemental affidavit of James Lockhart has been considered and is found to be insufficient to upset the policy decision made.

the exchange was not arbitrary or capricious with respect to these statutes.

C. HISTORIC PRESERVATION ACT

16 U.S.C. § 470(f) (Historic Preservation Act, § 106) requires federal agencies to afford the Advisory Council on Historic Preservation the opportunity to comment on any project that would affect a property which is eligible to be listed on or is actually listed on the national register of historic places. To determine if a property should be considered eligible for the National Register purposes, an agency must follow the section 106 process as set out in 36 C.F.R. § 800.4. Pursuant to this regulation, defendants have completed the review and have come to the conclusion that no part of the property is eligible for the National Register. Administrative Record, Volume 2A, Tab 1, p.6. The state historic preservation officer agreed with this determination. Administrative Record, Volume 1, Tab 1; Volume 3, Tab 37.

In reaching this conclusion the Forest Service took a number of steps to assure its conformance with 36 C.F.R. § 800.4(a) (identifying historical properties). A professional service, Overland Associates, Inc., was hired to assist it in this respect. The service reviewed existing information on potentially affected historic properties. No historic information was found as respects this site. See Administrative Record, Volume 2A, Tab 1, Overland Report, pp.5-1, 6-1. The state historic preservation officer was contacted as shown above. This officer also found no historical information on the site. Finally, the regulations call for an agency to seek information from people who may know of historic properties in the area, including Indian tribes. Id., § 800.4(a)(1)(3). The Forest Service pursued this requirement.

While land exchanges may not have been specifically discussed at the December 10 and 11, 1985, meeting between the Black Hills National Forest and traditional Indian spiritual leaders, the information regarding these exchanges

were made available before the meeting and discussions of religious sites at that meeting did not include the Dark Canyon Overlook. Administrative Record, Volume 2B, Tab 31. Much more importantly, on February 21, 1986, letters were sent to the tribal and spiritual leaders, specifically discussing the Van Etten exchange among others and requesting any information available about the land, or any suggestions which might help the Forest Service determine whether the land would be eligible for the National Register. Administrative Record, Volume 3, Tabs 33, 37. One response letter was received from Charlotte Black Elk, and this letter was in favor of continuing with the exchange. Administrative Record, Volume 3, Tab 37.

At this point the Forest Service decided to continue in the process to determine if any property would be eligible for the National Register. 36 C.F.R. § 800.482 states as follows: "Based on this assessment, the agency official should determine any need for further actions such as field surveys and predicted modeling to identify historic proper-

ties." The Forest Service in this case did hire a professional survey to be completed on the Dark Canyon Overlook. The survey was completed by Overland Associates, Inc., and a finding of no cultural sites was submitted, to which the state historic officer concurred. Volume 2A, Tab 1. Accordingly, the Court finds compliance with 36 C.F.R. § 800.4(c)(3), and the Historic Preservation Act.

While there is some marginal evidence that the findings of the report were inaccurate, this Court certainly cannot say that a decision based on an expert's report was arbitrary and capricious.[3] "Where, as here, the agency presents scientifically respectable conclusions which appellants are able to dispute with rival evidence of presumably equal dignity, we will not displace the administrative choice nor will we remand the matter to the agency in order that the

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[3]The supplemental affidavit of James Lockhart tends to establish the possible existence of an old quarry and a cave on the property. The Overland Report does not mention these features, but, instead, makes a general finding that there is no site on the land eligible for the National Register.

discrepant conclusions be reconciled." State of Louisiana ex rel. Guste v. Verity, 853 F.2d 322, 329 (5th Cir. 1988).

D. FIFTH AMENDMENT CONCERNS

Plaintiffs have neither addressed nor briefed this issue adequately. They point to no property interest that they have which would give them any due process rights beyond what would be considered arbitrary and capricious with respect to agency procedures.

E. THE RELIGIOUS PRACTICE CONTENTIONS

1. The First Amendment Contentions. One of the issues raised by plaintiffs is that the decision by the Forest Service failed to properly consider the impact of the contemplated use of the land on Indian religious practices, specifically those of plaintiff Gemma Lockhart. In a first amendment context, this Court's review is plenary. See Hill v. Blackwell, 774 F.2d 338, 343 (8th Cir. 1985). The Supreme

Court has set forth a two-part analysis under the free exercise clause. First considered is whether the challenged governmental action does in fact create a burden on the exercise of the claimant's religion. See United States v. Lee, 455 U.S. 252, 256, 257, 102 S. Ct. 1051, 1054-55 (1982). If a burden exists, the second part of the analysis is a weighing of the nature of the burden, the significance of the governmental interest at stake, and the degree to which that interest would be impaired by an accommodation for the religious practice. See Bowen v. Roy, 476 U.S. 693, 106 S. Ct. 2147 (1986); United States v. Means, 858 F.2d 404 (8th Cir. 1988). Even assuming that the land exchange will have severe adverse affects on the practice of religion, incidental affects of government programs which may make it more difficult to practice certain religions and which would have no tendency to coerce individuals into acting contrary to their religious beliefs, do not require government to bring forward a compelling justification for its otherwise lawful actions. See Lyng v. N.W. Indian Cemetery Protective

Ass'n, 108 S. Ct. 1319 (1988); United States v. Means, 858 F.2d 404 (8th Cir. 1988). In this case, there was no claim during the administration appeal that the exchange would make it impossible for plaintiff Gemma Lockhart to practice her religion, nor was there any claim that the action would coerce her into acting contrary to her religious beliefs. Her first amendment claim therefore fails.

2. The Indian Religious Freedom Act. In Crow v. Gullet, 541 F. Supp. 785 (D.S.D.) aff'd, 706 F.2d 856 (1982) it was stated that "[t]he act does not create a cause of action in federal court for violation of rights of religious freedom but is merely a statement of the policy of the federal government with respect to traditional Indian religious practices." This Act grants no more rights than exist under the first amendment freedom of religion analysis discussed above. Id. at 793. As to plaintiffs' argument that the Forest Service created the expectation of meaningful Indian input, they have failed to point to an established policy requiring prior

consultation with the tribe as required by the case they cite, Oglala Sioux Tribe v. Andrus, 603 F.2d 707, 721 (8th Cir. 1979). Furthermore, as set forth in the Historic Preservation Act section of this memorandum, traditional Indian leaders and tribes have been consulted.

F. ENVIRONMENTAL ASSESSMENT CONTENTIONS AND THE DECISION BY THE FOREST SERVICE NOT TO ORDER AN ENVIRONMENTAL IMPACT STATEMENT (EIS).

The National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321 - 4370, requires preparation of an environmental impact statement (EIS) only if the responsible federal agency determines in the first instance that a major federal action will significantly affect the quality of the human environment. 42 U.S.C. § 4332(2)(c); see also Ringsred v. Duluth, 828 F.2d 1305 (8th Cir. 1987); Olmstead Citizens for Better Community v. United States, 793 F.2d 201 (8th Cir. 1986).

NEPA has applied to situations where the actions are minor but formed a legal basis for enabling the private

parties to act. Winnebago Tribe of Nebraska v. Ray, 621 F.2d 269 (8th Cir. 1980). The Ninth Circuit has stated in Nat'l Forest Preservation Group v. Butz:

> While the federal defendants are not themselves planning to take action significantly affecting the quality of the human environment, 42 U.S.C. § 4332(c), the intervenors plan such action and the exchange is an act without which such action could not be taken. The land exchange is thus analogous to the licensing of or granting of federal funds to a non-federal entity to enable it to act. Such federal enablement has consistently been held to be subject to NEPA.

Cited in State of South Dakota v. Andrus, 462 F. Supp. 905 (D.S.D. 1978). Therefore, the homes which the intervenor plans to build must be included in any environmental assessment even though no EIA would have to be prepared if there were no exchange and the intervenor was going to build the houses on the land he owned before the exchange. This was done by the agency.

The standard under which an agency's decision not to require an EIS is well settled by the Eighth Circuit, but different from the usual arbitrary and capricious standard of

review set forth above. The burden of proof is upon the challenging party to show that there were facts omitted from the Administrative Record which, if true, would show that the action could have a substantial impact on the environment if such facts are established and they are of sufficient significance to warrant shifting the burden of proof the agency must then demonstrate that its negative determination was reasonable under the circumstances. This test is one of reasonableness, not whether the agency's determination was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. See Minn. Public Interest Research Group v. Butz, 498 F.2d 1314 (8th Cir. 1974) (en banc).

This Court finds as a matter of law that there were no facts omitted from the Administrative Record which could have a substantial impact on the environment. The plaintiffs list some of the factors used to determine whether an action is considered "significant" under NEPA, 40 C.F.R. § 1508.27, and raise the issues of decreased air quality, the

impact on soil and water conditions in the area, and the impact on aesthetics from the building of up to sixteen homes on the one hundred acres. These concerns were addressed by the Environmental Assessment Update, Administrative Record, Volume III, Tab 44. The Forest Service came to the conclusion that there would be no significant environmental impact after reviewing all of these concerns and obtaining yet another professional report on the geology of the land prepared by Wyss, Inc. Id. All of plaintiffs' concerns have been considered by the Forest Service and placed in the Administrative Record. The decision not to prepare an EIS was made in full compliance with NEPA and the regulations promulgated thereunder.

The agency action in this case was not in violation of any laws or regulations. Its findings and conclusions were not arbitrary, capricious, or an abuse of discretion. Its actions did not violate the first amendment rights of any plaintiff, and the decision not to prepare an EIS was a reasonable one.

Judgment shall be entered in accordance with this memorandum opinion.

Dated this 18th day of September, 1989.

BY THE COURT:

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RICHARD H. BATTEY
UNITED STATES DISTRICT
JUDGE

ATTEST:

WILLIAM F. CLAYTON, CLERK

By_____
Deputy Clerk

(SEAL)

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 89-5575SD

James Lockhart,	*	
	*	
Gemma Lockhart,	*	
	*	
Appellant,	*	
	*	
Sandra Reub, American Indians Against Desecration,	*	
	*	
v.	*	Appeal from the United States District Court for the District of South Dakota.
	*	
Darral Kenops, Forest Supervisor, Black Hills National Forest, United Forest Service; Gary Cargill, Regional Forest Service; F. Dale Robertson, United States Forest Service; John Block, Secretary of Agriculture; Verla Van Etten,	*	
	*	
Appellees.	*	

Submitted: September 10, 1990

Filed: March 7, 1991

Before WOLLMAN, Circuit Judge, HEANEY, Senior Circuit Judge, and MAGILL, Circuit Judge.

MAGILL, Circuit Judge.

Gemma Lockhart appeals from an order of the district court[1] granting summary judgment to the government in her action to enjoin the exchange of a parcel of federal land. On appeal, Lockhart argues that the Forest Service's decision to go ahead with the exchange without preparing an environmental impact statement (EIS) was arbitrary and capricious and violated the National Environmental Policy Act (NEPA). Lockhart also argues that the decision to proceed with the exchange violated the first amendment of the Constitution and the American Indian Religious Freedom Act (AIRFA) because the exchange will interfere with the exercise of Lockhart's religion and because Indian religious leaders were not consulted. Because we find that the Forest Service's decision was not arbitrary and

[1]The Honorable Richard H. Battey, United States District Judge for the District of South Dakota.

capricious and did not violate NEPA, AIRFA or the first amendment, we affirm.

I. BACKGROUND

A. The Administrative Process

This action concerns a land exchange between the federal government and Verla Van Etten, the intervenor below. Proceedings have been going on for nearly nine years. On September 22, 1982, Van Etten proposed exchanging 160 acres of land she owned in the Black Hills of South Dakota for 100 acres owned by the Forest Service in another part of the Black Hills. It is this second parcel, located along the edge of Dark Canyon in a rural area near Rapid City, that the parties are arguing about. The purpose of the exchange, from the Forest Service's point of view, was to consolidate federal lands; the Dark Canyon parcel was surrounded on all sides by private land, whereas the land offered by Van Etten was surrounded on all sides by land

that already belonged to the Forest Service. The Van Etten parcel was also particularly desirable to the Forest Service because it is important wildlife habitat. Van Etten wanted to develop the Dark Canyon parcel; she planned to build sixteen luxury homes on it. On October 6, 1983, the Regional Forester issued an environmental assessment (EA) as required by § 254.10 of the Forest Service regulations governing land exchanges, 36 C.F.R. § 254.10(b), to ensure compliance with the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4331-4347. NEPA requires that an environmental impact statement (EIS) be done for all "major federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C) (1988). An agency prepares an EA to determine whether an EIS is required under this standard. The EA concluded that the exchange would have no significant impact on the environment and that therefore no EIS was required. However, the EA stated that approval of the exchange was "in concept only"; final approval was expressly conditioned on comple-

tion of studies of cultural and mineral resources with a finding that they would not be significantly affected.

When appraisals showed that Van Etten's land was worth less than the federal land, Van Etten offered an additional eighty-acre parcel in the same area to equalize the land values. On January 3, 1985, the Regional Forester approved the revised exchange proposal and issued a revised EA, again concluding that the exchange would have no significant impact on the environment and that no EIS need be done. During the next month, February, Lockhart and five other Dark Canyon landowners appealed the decision to the Forest Service pursuant to 36 C.F.R. § 211.18. They complained that developing the land would adversely affect the air, water, and soil, would harm wildlife, including endangered and threatened species, and would interfere with Indian religious ceremonies. On June 7, 1985, the Chief of the Forest Service, Max Peterson, remanded the matter to the Regional Forester, saying that the Regional Forester's approval of the project was "procedurally deficient" because:

(1) the proposed exchange of the second parcel of eighty acres had never been publicly advertised, as required by 36 C.F.R. § 254.8; (2) the earlier approval had been contingent on studies of cultural and mineral resources that were never done; and (3) the revised EA did not discuss the environmental impact of Van Etten's planned use of the land. Chief Peterson also said that the EA ought to discuss the applicable state and county regulations and how they would affect the intended use of the property. On July 9, 1985, the Regional Forester issued a supplemental EA that included the missing studies and other supporting documentation, including the applicable zoning regulations.

In August 1985, Lockhart and two of the other original administrative appellants appealed again. On September 2, 1986, Chief Peterson again sent the case back to the Regional Forester for supplementation of the administrative record under 36 C.F.R. § 211.18(q).[2] The Chief said

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[2]"If the appeal record is considered inadequate to affirm or reverse a decision, the Reviewing Officer may suspend the appeal process and request additional information, or

that because Van Etten's plans for developing the land had become more definite, the record should be supplemented to consider information about the environmental effect of those plans. In his letter ordering the remand, Chief Peterson said, "[W]e are concerned that the potential environmental consequences . . . are not sufficiently discussed" in the EA, and he ordered the Regional Forester "to specifically address the direct effects of Van Etten's proposal on the soil, water, and air quality on and in the vicinity of the parcel, as well as its indirect effects on highway traffic, esthetics, and forest fire problems."

On November 4, 1986, the Regional Forester issued an environmental assessment update (EA update or final EA) with a geological study of the land attached. The EA update addressed the issues the Chief had specified, albeit not in great detail. On May 7, 1987, Dale Robertson, the new Chief of the Forestry Service, approved the exchange.

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remand the case for further action." 36 C.F.R. § 211.18(q) (1989).

When the Secretary of Agriculture declined to review that determination, the decision became final under 36 C.F.R. § 211.18(f)(6). The exchange could not take place, however, because Public Land Order 725 (PLO 725), issued June 4, 1951, had classified the land for public uses and made it illegal for the government to transfer it. An injunction issued in National Wildlife Fed'n v. Burford, 835 F.2d 305 (D.C. Cir. 1987), prohibited the government from changing the classification. Therefore, the case was in procedural limbo for some time after the Chief's decision.

B. Court Proceedings

On August 4, 1987, Lockhart and two other Dark Canyon landowners who had appealed at the administrative level filed this action, alleging violations of NEPA, the Endangered Species Act (ESA), 16 U.S.C. §§ 1531-1544, the Bald Eagle Protection Act, 16 U.S.C. § 668, § 106 of the National Historic Preservation Act, 16 U.S.C. § 470f, the American Indian Religious Freedom Act (AIRFA), 42

U.S.C. § 1996, the Federal Land Exchange Acts, 16 U.S.C. §§ 485, 486, 516, 521d, 555l; 42 U.S.C. §§ 1715, 1716; 7 U.S.C. § 1011, and the first and fifth amendments to the federal Constitution. The action sought declaratory and injunctive relief to prevent the Forest Service from proceeding with the exchange unless and until the cited statutes were complied with. The parties stipulated to a stay, however, because of PLO 725 and the injunction in Burford. Then, on November 4, 1988, the D.C. Circuit vacated the Burford injunction, and six months later PLO 725 was revoked with respect to the land in this suit. 54 Fed. Reg. 17,708 (1989) (codified at 43 C.F.R. PLO 6728). The revocation of PLO 725 became effective May 25, 1989; shortly thereafter, the government announced that it intended to go ahead with the exchange. On July 5, 1989, the district court granted a temporary restraining order (TRO) prohibiting the exchange, subject to posting of a $50,000 bond by plaintiffs. When the plaintiffs did not post the bond, the court lifted the TRO and allowed the exchange subject to the require-

ment that Van Etten not cause "any physical change or destruction of the environment or property" until the case was over. The exchange occurred on July 7, 1989.[3] The district court granted the government's motion for summary judgment on September 18, 1989, holding that the agency's decision not to prepare an EIS was not arbitrary and capricious. Lockhart filed a notice of appeal on November 17, 1989. On appeal, she claims violations only of NEPA, AIRFA, and the first amendment. The other two federal plaintiffs did not appeal.

II. DISCUSSION

We review the district court's decision de novo. "[T]he appellate court must render an independent decision on the basis of the same administrative record as that before the district court; the identical standard of review is employed at both levels; and once appealed, the district court

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[3]On approximately August 21, 1990, Van Etten put the land up for resale.

decision is accorded no particular deference." Brown v. United States Dep't of Interior, 679 F.2d 747, 748-49 (8th Cir. 1982) (quotation omitted). Under § 706(2)(A) of the Administrative Procedure Act, an informal determination by an agency must be set aside if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A) (1988). An agency's decision not to prepare an EIS is reviewed under this standard. Marsh v. Oregon Natural Resources Council, 109 S. Ct. 1851 (1989); Goos v. I.C.C., 911 F.2d 1283, 1291-92 (8th Cir. 1990).[4]

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[4]Before Marsh, the Eighth Circuit had reviewed agency decisions not to prepare an EIS under a standard of reasonableness in the circumstances. See, e.g., Minnesota Pub. Interest Research Group v. Butz, 498 F.2d 1314, 1320 (8th Cir. 1974). In Goos, 911 F.2d at 1292, a panel of this court recognized that these earlier cases were incorrect; however, in Marsh, the Supreme Court said that in practice the difference between the two standards is not of much consequence and should not require extensive reworking of established NEPA law. 109 S. Ct. at 1861 n.23.

A. NEPA

NEPA requires that an EIS be done for all "major federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). "Affecting" is defined as "will or may have an effect on." 40 C.F.R. § 1508.3. To determine whether the proposed action "significantly" affects the environment requires consideration of a variety of factors under 40 C.F.R. § 1508.27.

When the federal government exchanges land, it must consider the environmental impact not only of the exchange itself, but also of the proposed use of the federal land once it passes into private hands. National Forest Preservation Group v. Butz, 485 F.2d 408, 411-12 (9th Cir. 1973). Therefore, the Forest Service was required to consider the effects of Van Etten's planned development in determining whether the exchange would significantly affect the human environment.

Lockhart claims that the Forest Service's decision was arbitrary and capricious because the Service did not

properly consider the factors enumerated in § 1508.27. She argues that the project significantly affects the environment and that therefore an EIS is required. While we agree that the agency's consideration of some points was not as careful as it could have been, we cannot say that the Forest Service's consideration of environmental factors was so deficient as to make its decision arbitrary and capricious. We now address Lockhart's specific contentions.

1. Water Quality

Lockhart contends that effluent from the sewage systems of the houses to be constructed could seep through the ground and through rock fissures into the aquifer that supplies water to her and her neighbors or onto the walls of Dark Canyon. From the canyon it would drip down into Rapid Creek, directly below, which is the water supply for Rapid City. The study submitted with the final EA of November 1986 discusses possible problems with sewage disposal and acknowledges that sewage could surface on the can-

yon walls. The study makes recommendations for proper placement of septic tanks and leach fields that would avoid the problem--but then goes on to say that such placement may not be possible on four of the sixteen lots. However, the study also points out that the applicable zoning regulations[5] contain stringent requirements for safe sewage disposal, and thus concludes that there would be no significant impact on the environment. After reviewing the zoning regulations, which require that sewer systems comply with detailed design and specification requirements and be approved by the city engineer, we find that the Forest Service's conclusion that the zoning regulations will prevent any significant impact on the environment was not arbitrary and capricious. See Maryland-National Capital Park & Planning Comm'n v. United States Postal Serv., 487 F.2d 1029, 1036-37 (D.C. Cir. 1973) (compliance with zoning laws tends to

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[5]It is undisputed that the development would be subject to both the Pennington County and Rapid City zoning ordinances. The city ordinance applies because the land is within three miles of the city limits.

show that impact of the land use is not "significant"); Sierra Club v. Cavanaugh, 447 F. Supp. 427, 432 (D.S.D. 1978) (same; "the Federal agency is to be held to no stricter requirement of assuring environmental quality than local residents acting through their representatives demand"). We do note, however, that according to the study there seems to be no safe way to dispose of sewage for four of the lots; we assume that unless a safe way is found the zoning commission will not allow houses to be built on those lots.

2. Air Quality, Soil, Esthetics

These are all addressed in the final EA, and we find that the conclusion of no significant impact was not arbitrary and capricious.

3. Endangered and Threatened Species

The NEPA regulations require that the agency consider "[t]he degree to which the action may adversely affect an endangered or threatened species or its habitat that has

been determined to be critical under the Endangered Species Act of 1973." 40 C.F.R. § 1508.27(9). Lockhart argues that the proposed development will harm bald eagles and peregrine falcons that inhabit the area. Bald eagles and peregrine falcons have been classified as protected species under the Endangered Species Act (ESA), 16 U.S.C. §§ 1531-1544 (1988). On appeal, however, Lockhart claims a violation only of NEPA, not of the ESA itself. Lockhart claims that the Forest Service failed to give proper weight to sightings of the birds by local landowners and that the Service's own studies were sloppily done and inaccurate; therefore, she argues, the Service erroneously and arbitrarily concluded that the proposed development would have no significant impact on the endangered birds.

The evidence does conflict as to whether eagles and falcons frequent or nest on the tract. The record contains several letters and affidavits reporting sightings of eagles and falcons and claiming that they nest on the site; the Forest Service's opposite conclusion, however, is also well support-

ed by evidence. The Forest Service conducted two field surveys of the site and consulted several other relevant studies that had already been done. The studies conclude that Dark Canyon is not critical habitat for either species. No nesting sites were found during the field surveys, nor did the surveyors observe any eagles or falcons on or near the land. Bald eagles are not believed to nest in the Black Hills at all; they do spend the winter there, but the Dark Canyon site is not in a known winter concentration area, according to the studies. As for the peregrine falcons, the last confirmed sighting of a falcon eyrie was in Dark Canyon, but that was in 1960. The recent studies done by the Forest Service conclude that Dark Canyon is not prime habitat for peregrines because the cliffs are not high enough and because there is too much human activity nearby. Dark Canyon was rejected as a release site for these very reasons when the Forest Service was trying to reintroduce peregrine falcons into the Black Hills in 1979.

While the Forest Service's conclusion may not be undisputed, it is certainly not unsupported by evidence. As the court said in Louisiana ex rel. Guste v. Verity, "[O]ur deference to the agency is greatest when reviewing technical matters within its area of expertise, particularly its choice of scientific data and statistical methodology. . . . [W]here, as here, the agency presents scientifically respectable conclusions . . . we will not displace the administrative choice." Louisiana ex rel. Guste v. Verity, 853 F.2d 322, 329 (5th Cir. 1988). Therefore, we find that the Forest Service's determination that the exchange would have no significant impact on endangered and threatened species was not arbitrary and capricious.

4. Historic and Cultural Resources

Under the NEPA regulations, in determining whether the proposed action will significantly affect the environment, the agency must consider "unique characteristics of the geographic area such as proximity to historic or cultural

resources," 40 C.F.R. § 1508.27(3), and "[t]he degree to which the action may adversely affect . . . sites . . . listed in or eligible for listing in the National Register of Historic Places or may cause loss or destruction of significant scientific, cultural, or historic resources," 40 C.F.R. § 1508.27(8). The Forest Service commissioned a survey of the tract to identify any historic or archaeological sites; none were found. It also searched its files to find out if any such sites had been previously identified, again without success. The final EA concluded that the tract contained no historic or cultural resources, and the South Dakota Historic Preservation Office concurred in the finding. Thus, the Forest Service did make an effort to determine whether any historic or cultural resources would be affected by the proposed development, and the requirements of NEPA were met.

5. State and Local Law

Subsection (10) of 40 C.F.R. § 1508.27 requires that an agency consider whether its proposed action "threatens a

violation of Federal, State or local law or requirements imposed for the protection of the environment." Although the EA included copies of and discussed the applicable county and city zoning ordinances, it did not discuss any other state or local law. The state statutes Lockhart cites in her brief are broad provisions expressing state policy in favor of safe waste disposal, against water pollution, and in favor of maintaining air quality. None of them cover any ground not covered by NEPA. Hence, although the Forest Service should have specifically referred to these statutes, its error was harmless because the EA covered the same subject matter.

6. Other Effects

Citing 40 C.F.R. § 1508.27, Lockhart claims that the Forest Service was required to consider the sociological and community effects of the land exchange and housing development; however, § 1508.27 contains no language to that effect. It does say, as Lockhart points out, that the agency

should consider "[t]he degree to which the effects on the quality of the human environment are likely to be highly controversial." 40 C.F.R. § 1508.27(4). Lockhart claims this requirement was not met because the Forest Service got eight letters from neighbors protesting the exchange, none in favor of it, and yet did not discuss public opposition in the EA. This argument fails because "controversial" refers to the existence of a "substantial dispute . . . as to the size, nature, or effect of the major federal action rather than to the existence of opposition to a use." See Rucker v. Willis, 484 F.2d 158, 162 (4th Cir. 1973); North Dakota v. Andrus, 483 F. Supp. 255, 258-59 (D.N.D. 1980).

Lockhart points to the affidavit of Dr. Ken Fish as evidence that the Forest Service overlooked the "[u]nique characteristics of the geographic area," 40 C.F.R. § 1508.27(3), and "[t]he degree to which the action . . . may cause loss or destruction of significant scientific, cultural, or historical resources," 40 C.F.R. § 1508.27(8). Dr. Fish, a professor of biology, stated that every year he takes his

students on a field trip to Dark Canyon and that it is of unique educational and scientific value to him and his students. While the plaintiff in a NEPA suit may submit evidence showing substantial environmental issues the agency missed, use of the area for biology field trips does not by itself qualify as a substantial environmental issue that would render the agency's decision arbitrary and capricious, particularly in light of the fact that the information in Dr. Fish's affidavit could have been presented earlier, during the administrative process.

7. Resale

In September 1990, Lockhart submitted a letter calling the attention of the court to a new development in the case: Van Etten was advertising the land for sale, apparently having abandoned her plans to develop it herself. Lockhart argues that the new purchaser could pursue development plans different from those considered by the Forest Service, with potentially disastrous consequences to the

environment. She urges that the district court's grant of summary judgment should be reversed and the case remanded on this ground.

When the government sells or exchanges federal land, it must consider the environmental impact of the proposed use of the federal land by the private purchaser, but it need not consider the possible impact of use by hypothetical subsequent purchasers. Once the land passes into private hands, later sales are no longer subject to NEPA. We would scrutinize the matter more closely if there were anything to suggest that Van Etten's purchase was a sham--that she obtained the land in order to resell it to someone else so that the real purchaser could evade NEPA scrutiny. Here, however, the resale is clearly a product of the long administrative and judicial process rather than an attempt to evade it.[6] This court's task is to make sure the Forest Service considered the information available at the time it made

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[6]According to letters in the record, Van Etten found it difficult to pay the interest payments on the land without the anticipated revenue from selling the houses.

its decision; if the agency's decision was proper at the time it was made, our inquiry is at an end.

B. AIRFA/First Amendment

Lockhart next argues that the Forest Service violated the American Indian Religious Freedom Act (AIRFA), which provides: "[I]t shall be the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian . . . including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites." 42 U.S.C. § 1996 (1988). First, Lockhart claims a procedural violation of AIRFA in that the Forest Service failed to consult with Indian spiritual leaders before making its decision. AIRFA contains no such consultation requirement. AIRFA is merely a statement of federal policy to protect Indians' exercise of their religion, it confers no cause of action. Lyng v. Northwest Indian Cemetery Protec-

tive Ass'n, 108 S. Ct. 1319, 1328 (1988). The original version of AIRFA contained a one-time consultation requirement; section 2 of the session law, left uncodified, directed that all federal departments and agencies evaluate their policies and procedures in consultation with native American traditional religious leaders to determine changes necessary to preserve Indian religious rights and practices, but this one-time review was to be completed by August 11, 1979, three years before the Van Etten exchange was proposed. Pub. L. No. 95-341, § 2, 92 Stat. 470 (1978); see Lyng, 108 S. Ct. at 1328. Also, the language of the section indicates that it required consultation about a generalized revamping of agency policies and procedures, not about specific decisions like this one.[7]

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[7]Although it is legally irrelevant, we note that the record shows that the Forest Service erred on whether a consultation had taken place; its summary of a conference with Indian spiritual leaders states that the Van Etten exchange was discussed, whereas the transcript of the conference shows that it was not.

Second, Lockhart claims a substantive violation of AIRFA. She contends that AIRFA and the free exercise clause of the first amendment require the agency to take into account Indian religious concerns in making its decision, citing Lyng for the proposition that agencies have a legal duty to accommodate Indian religious practices. While the Supreme Court in Lyng did say that "[t]he Government's rights to the use of its own land . . . need not and should not discourage it from accommodating religious practices like those engaged in by the Indian respondents," 108 S. Ct. at 1328, this language is purely precatory. The Court's holding was that AIRFA creates no judicially enforceable rights. See id. at 1328; see also Crow v. Gullet, 706 F.2d 856, 858 (8th Cir.) (AIRFA creates no rights beyond those granted by the first amendment), cert. denied, 104 S. Ct. 413 (1983). The first amendment does not require the government to conduct its own affairs to comport with the religious beliefs of its citizens. Lyng, 108 S. Ct. at 1325; see also United States v. Means, 858 F.2d 404, 407 (8th Cir. 1988) (listing

cases refusing to overturn governmental land management decisions challenged by Indians on free exercise grounds), cert. denied, 109 S. Ct. 3227 (1989). In fact, the Court commented in Lyng, to limit the government's use of its own land to avoid disrupting religious ceremonies might well violate the first amendment as it would impose a "religious servitude" on the property and subsidize the religion in question. 108 S. Ct. at 1328.

Lockhart also appears to base her claim of failure to consider religious factors on NEPA, as she complains of the "arbitrary and capricious manner in which religious factors were ignored" and says there is evidence of a "substantial environmental impact" on Indian religious practices. Reply Brief at 17. NEPA, however, does not mandate consideration of a proposal's possible impact on religious sites or observances.

III.

Because we hold that the Forest Service complied with the requirements of NEPA, that it did not violate AIRFA or the first amendment, and that its decision to proceed with the land exchange was not arbitrary and capricious, we affirm the decision of the district court.

A true copy.

Attest:

CLERK, U. S. COURT OF

APPEALS, EIGHTH CIRCUIT.

UNITED STATES COURT OF APPEALS

for the Eighth Circut

No. 89-5575SD

Gemma Lockhart,

Appellant

vs.

Darral Kenops, etc., et al.,

Appellees.

Order Denying Petition

For Rehearing and Suggestion

For Rehearing En Banc

Appellant's pro se suggestion for rehearing en banc has been considered by the court and is denied by reason of the lack of a majority of the active judges voting to rehear the case en banc.

Petition for rehearing by the panel is also denied.

April 26, 1991

Order Entered at the Direction of the Court

Michael E. Gais

Clerk, U.S. Court of Appeals, Eight Circuit

UNITED STATES FOREST SERVICE

On Re:)
) STATEMENT OF ISSUES
Van Etten Land)
Exchange)

TO: Regional Forester
Rocky Mountain Region
11177 West Eighth Avenue
P.O. Box 25127
Lakewood, Colorado 80225

This appeal is submitted by Ms. Gemma Lockhart, an affected land owner, pursuant to 36 C.F.R. 211.18. The actions being appealed from are the Revised Decision Notice of January 3, 1985 and the Decision Notice of October 6, 1983, incorporated by reference therein.

On September 22, 1982, Verla Van Etten filed a Statement of Intent to exchange private land for 100 acres of Forest Service land described as E 1/2 NW 1/4 NW 1/4, NE 1/4 NW 1/4, NW 1/4 NE 1/4 of Section 13, T1N, R6E, BHM, Pennington County, South Dakota. Mrs. Van Etten wishes to obtain said land for a 16 unit housing development, which will overlook Dark Canyon where Ms. Lockhart and her family own and use land for domestic and ceremoni-

al purposes. Mrs. Van Etten originally offered approximately 160 acres of fee patent land for said exchange.

On October 6, 1983, Craig Rupp, Regional Forester, made a finding of No Significant Impact and issued an Environmental Assessment (EA) Decision Notice selecting the first of two examined alternatives, deciding to continue administrative processing of the land-for-land exchange proposed. According to pages 2 and 3 of the EA Decision Notice, the "approval in concept only" was to be contingent upon the completion of a Cultural Resource Examination and Report on Selected private land to be obtained therefore. The EA and REA inadequately assesses the cultural resources which might be affected by the proposed exchange and the housing project. The EA and REA also failed to adequately assess the effect on the human environment through deterioration of the air quality, esthetics, and peace and quiet which would result from the proposed development of what has been public land, on the landowners around the proposed project. Finally, the EA and REA

failed to adequately assess the impact on Ms. Lockhart's exercise of her Indian religious ceremonies, which the proposed project would overlook and thereby disrupt.

Additionally, though a landowner in the immediate vicinity, Ms. Lockhart, as well as many of her neighbors, did not receive actual notice of this proposed land exchange and resulting housing project until a few days ago. Thus, the notice to affected parties was inadequate necessitating a hearing where such individuals and families can give constructive input on how the Forest Service exchange and the proposed housing project is not in the public interest.

For all the above-stated reasons, the REA Decision and the incorporated EA Decision should be reversed since they violate the Federal Land Policy and Management Act, 43 U.S.C. 1716; the General Land Exchange Act, 16 U.S.C. 485 and 486; the National Historic Preservation Act, 16 U.S.C. 470 et seq.; the National Environmental Policy Act, 42 U.S.C. 4321 et seq.; Executive Order No. 11593; the Historic and Archaeological Data Preservation Act, 16

U.S.C. 469 et seq.; the First Amendment to the U.S. Constitution; the Indian Religious Freedom Act, 42 U.S.C. 1996; the Endangered Species Act, 16 U.S.C. 1531 et seq.; and the Fifth Amendment right to Due Process, embodied in the U.S. Constitution.

Dated this ____ day of February, 1985.

Respectfully submitted,

GEMMA LOCKHART
Route 8, Box 4478
Rapid City, S.D. 57702

United States Department of Agriculture

Forest Servie

Black Hills National Forest

Custer, South Dakota 57730

Reply to: 2630 Habitat Sept. 7,1978

Subject: Identification of Essential Habitat for Endangered Species and Threatened Species

To: Regional Forester, R-2

Attached is the information requested concerning identification of essential habitat for endangered or threatened species.

The attached material includes descriptions of four areas determined to be essential habitat for the peregrine falcon on the Black HIlls National Forest. Also included, is a map of the Black Hills National Forest, which illustrates defined boundaries of identified essential habitat areas.

These areas are presently unoccupied and are under consideration as possible peregrine release areas.

W. H.

for

James R. Mathers

Forest Supervisor

Enclosures

DARK CANYON

1. Coordinates:

Latitude: 44°8' South to 43°55'

Longitude: 103°39' East to 103°16'

2. Description of Boundaries.

The north border is marked by the Lawrence-Pennington County lines,from where East Gimlet Creek crosses the county line on the west, to where Forest Service road 166 crosses the county line to the east. From Forest Service road 166 the border continues along 166 into Rapid City. On the west, bhe border extends along East Gimlet Creek to Forest Service road 231, along 231 to Tigerville and from Tigerville along 231 into Hill city. From Hill City the border goes east along Highway 385 to Sheridan Lake and from Sheridan Lake along Forest Service road 392 to Rapid City.

3. Breakdown of Acreage.

Unoccupied Habitat: Forest Service

119,700 acres

Private:

30,700 acres

Total:

150,400 acres

Occupied: None.

4. Background.

Dark Canyon lies at an elevation of 3500 feet to 4500 feet, in the east-central Black Hills. It contains cliffs of moderate to low height (up to 75 feet) which have a dominating view of the Canyon. These cliffs contain sufficient potholes and ledges to provide nests for Peregrine Falcons.

There is an abundance of avian prey within the Canyon, including small to medium sized terrestial birds, shorebirds, and waterfouwl. In addition, there are irrigated croplands, two large reservoirs,

open meadows and plains easily within the Peregrine Falcon's hunting range. Present and potential human disturbance may be a negative factor in establishing Peregrine Falcons in this canyon, as it lies rather close to a major population center. However, Dark Canyon and the surrounding area should be considered essential habitat for this species because it contains the last historic nesting site of Peregrine Falcons in the Black Hills.

BEST AVAILABLE COPY

Advisory
Council On
Historic
Preservation

The Old Post Office Building
1100 Pennsylvania Avenue, NW, #809
Washington, DC 20004

July 25, 1988

Mr. Gary E. Gargill
Regional Forester
Rocky Mountain Region
U.S.D.A. Forest Service
11177 W. 8th Ave., Box 25127
Lakewood, CO 80225-0127

Attn: 1540(L)

Dear Mr. Cargill:

Thank you for your letter of June 30, which we received on July 11, providing us with information on the Van Etten land exchange on the Black Hills National Forest.

We have completed our review of the Forest Service's determination that this exchange would have "no effect" on historic properties; as you know, this review was conducted pursuant to 36 CFR §800.6(e), as the result of a request by Mr. Bruce Ellison of Rapid City, South Dakota.

Our analysis of the Forest Service's determination is enclosed, including recommendations for Forest Service action. Pursuant to 36 CFR §800.6(e)(2), you should reconsider your finding of "no effect." Since this matter pertains to the eligibility of a property for inclusion in the National Register of Historic Places,, we have also referred it to the Keeper of the Register, in accordance with 36 CFR §800.6(e)(3). However, since there manifestly are insufficient data to allow the Keeper to reach a conclusion about eligibility, we do not believe that the Forest Service should seek a formal determination at this time. Instead, the Forest Service should carry out the additional identification efforts recommended in our analysis, and on the basis of these efforts comply as needed with 36 CFR §800.4(c) et seq.

Sincerely,

Thomas F. King
Director, Office of Cultural
Resource Preservation

Enclosure

ANALYSIS
of BLACK HILLS NATIONAL FOREST'S
DETERMINATION OF "NO EFFECT"
FOR THE VAN ETTEN EXCHANGE

Prepared by T.F. King, Director
Office of Cultural Resource Preservation
Advisory Council on Historic Preservation
7/16-21/88

Introduction

The Black Hills National Forest has determined that exchange of a 100 acre parcel of land under its jurisdiction for a larger parcel presently in private ownership would have "no effect" on historic properties. The exchange transaction is referred to as the "Van Etten Exchange." Attorney Bruce Ellison of Rapid City, South Dakota, representing clients opposed to the exchange, has requested, pursuant to 36 CFR §800.6(e), that the Council review this determination. The Rocky Mountain Regional Office of the Forest Service has provided us with documents pertinent to the Forest's determination. What follows is our analysis of those documents, to determine whether the Forest Service's determination was a correct one.

To avoid future questions on this point, it should be noted at the outset that under the revised version of 36 CFR Part 800 published for effect in late 1986, the Forest's determination would be procedurally incorrect on its face. Since the determination was based on the perceived absence of historic properties[1] within the parcel to be transferred out of Federal ownership, the determination technically should be one of "no properties" under 36 CFR §800.4(d), rather than one of "no effect" under 36 CFR §800.5(b). There is little substantive difference between these two kinds of determinations, however, and in any event, the determination was made in 1984, when the Council's 1979 regulations were in effect; these regulations were much less clear than the 1986 regulations are about the distinction between "no properties" and "no effect." It should also be noted that technically, the Forest does not seem to have actually made the determination; the State Historic

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[1] That is, properties eligible for inclusion in the National Register of Historic Places. See 16 U.S.C> 470W).

Preservation Officer (SHPO) did, in his letter of September 13, 1984. This was technically incorrect under the 1979 regulations, as it is under the 1986 regulations, but since the determination seems to have been adopted by the Forest as its own, this seems to us to have no substantive importance to the present analysis, though the Forest Service should be careful in the future to ensure that its procedures for determining effect comport with the regulations.

Issues

Since the Forest's determination, in substance, was that the 100 acre parcel to be transferred out of Federal control contained no historic properties, the correctness of the Forest's determination turns on the question of whether the Forest carried out an appropriate effort to identify such properties. Two issues must be addressed in attempting to answer this question:

Was the Forest's approach to the alleged traditional religious significance of the parcel appropriate?

Mr. Ellison's clients and American Indians Against Desecration (AIAD) have alleged that the parcel has significance in the traditional religious beliefs and/or practices of the spiritual leaders of the Lakota Nation (See Hammil affidavit, p. 1). The Forest Service argues that under the criteria of eligibility for the National Register of Historic Places (36 CFR §60.4), "properties used for religious purposes shall not be considered eligible for the National Register unless primary significance is derived from architectural or artistic distinction or historical importance," and that is "cultural resource" survey of the parcel revealed no properties with such importance (See Regional Forester's Responsive Statement, pp. 8, 10). The Service goes on to argue that its further efforts to consult with traditional leaders of the Lakota and other American Indian groups in the area were adequate to determine the religious significance of the parcel, whatever statutory base there

might be for doing so (See Regional Forester's Responsive Statement, pp. 9-10).

Was the Forest's effort to identify historic properties in general adequate and appropriate?

This question in part subsumes the previous one; if the Forest Service is wrong in its assumptions about traditional religious properties and its efforts to address them, then its overall effort to identify historic properties would clearly be flawed. Additional questions have been raised by Mr. Ellison's clients about the adequacy of the Forest's identification effort, however, and they have alleged the presence of a cave and a quarry of possible historical significance, neither of which was identified in the "cultural resources" survey report prepared for the Forest by it contractor, Overland Associates (Overland Associates 1984).

We will address each of these questions in turn.

Was the Forest's approach to the alleged traditional religious significance of the parcel appropriate?

This question has two parts: First, is the Forest Service correct in its interpretation of the National Register Criteria? If the Forest Service is correct, then under Section 106 of the National Historic Preservation Act and 36 CFR Part 800, it has no responsibilities regarding traditional religious properties, and for our purposes, the second part of the question need not be addressed. If the Forest Service is incorrect, then the second part of the question is: Were the efforts undertaken by the Forest Service adequate to identify and evaluate traditional religious properties?

Interpretation of the National Register Criteria

The Forest Service relies on four documents as bases for its conclusion that under the National Register Criteria properties "used for religious purposed" are not eligible.

The first document is 36 CFR §60.4, which presents the Criteria themselves. According to the Forest Service,

"(t)his section of the regulations specifically states that properties used for religious purposes shall not be considered eligible for the National Register unless primary significance is derived from architectural ar artistic distinction or historical importance" (Regional Forester's Responsive Statement p.8).

The Forest Service's reference is to the "Criteria Considerations" included as an unnumbered subsection of 36 CFR §60.4, which state in part that:

> **"(o)rdinarily...properties owned by religious institutions or used for religious purposes...shall not be considered eligible for the National Register. However, such properties will qualify...if they fall within the following categories:**
>
> > **(a) A religious property deriving primary significance from architectural or artistic distinction or historical importance..."**

National Register Bulletin 15 (National Park Service: issued 6/1/82) discusses how this criteria consideration is to be

applied. It notes that "(a) religious property may be eligible...for its significance in the history of religion if that significance has scholarly secular recognition..." (p. 46), "for association with an individual important in religious history, if that significance has scholarly, secular recognition..." (p. 47), or for its ability to "yield important information about the prehistoric or historic religious practices of a cultural group" (p. 48). It also directs that "(a) religious property...should be evaluated...specifically in comparison to other properties of its type, period, method of construction, and so on" (pp. 47-48).

The Forest Service's interpretation that under 36 CFR §60.4 a property "shall not be considered eligible for the National Register" if it is used for religious purposes" is not quite consistent with the actual language of the regulation; 36 CFR §60.4 says that a property used for religious purposes **ordinarily** shall not be considered eligible, and National Register Bulletin 15 goes on to discuss in some detail the circumstances under which such a property can be

considered eligible. The critical considerations in 36 CFR §60.4 provide a basis for critical evaluation of properties used for religious purposes, but they do not provide a basis for rejecting the eligibility of such properties out of hand.

It should be noted that quite a number of properties used by Native American groups for religious purposes have been included in, or determined eligible for, the Register; notable among these are the Helkau Historic District on the Six Rivers National Forest in California (site of the famous "GO-Road" case), Kootenai Falls in Montana, Tahquitz Canyon in southern California, and Kaho'olawe Island in Hawaii.

The second document relied on by the Forest Service to support its interpretation of 36 CFR §60.4 is the letter of May 2, 1986 from the South Dakota SHPO to the Forest Supervisor, which states the SHPO's "understanding...that religious sites are not eligible for listing on the National Register unless they are also significant under other criteria." This can only be interpreted as a gloss on the criteria

consideration discussed above, but it is even less consistent with the actual language of the regulation, and with the Register's interpretation of that language, than is the Forest Service's representation. The "religious property" criteria consideration cannot legitimately be construed in the way the SHPO apparently construes it--to require that if a property is used for religious purposes, it cannot be included in the Register unless it is significant for some reason having nothing whatever to do with its religious use.

The other two documents on which the Forest Service relies for its interpretation of the National Register Criteria are both letters commenting on the Council's 1985 draft "Guidelines for Consideration of Traditional Cultural Values in Historic Preservation Review." To address these documents sensibly it is first necessary to discuss the purpose for which the Guidelines were drafted, and their subsequent history.

In the early 1980s, the Council had begun to become involved in review of a number of Federal undertaking

having effects on what we now call "traditional cultural properties"--that is, properties whose historical significance is derived from the roles they have played, and may continue to play, in the traditional lifeways of a community. Among these lifeways are those carried out by Native American groups that Euroamerican society defines as "religious," and one of the problems the Council found itself facing was a tendency by agencies and SHPOs to use the "religious property" criteria consideration in the National Register Criteria to exclude from consideration under Section 106 properties that played important roles in such lifeways. This was--and is--a matter of serious concern to us; we felt--and feel--that this practice can amount to discrimination against Native American groups on religious and racial grounds. It should be recalled that the "religious property" criteria consideration permits the inclusion of religious properties if their "primary significance is derived from architectural or artistic distinction or **historical** importance" (emphasis added). Many Native American groups do not distinguish

"religion" from the rest of culture, or vice-versa, as does Euroamerican society. In many American Indian languages, in fact, there is no word for "religion." As a result, religious history, including the "myths" upon which religious practices are often based, is often if not usually integral to the culture history of a Native American group. If properties reflective of those aspects of Native American culture that Euroamerican scholars and administrators define as "religious" are excluded from consideration for inclusion in the National Register, and hence from consideration under Section 106 and other protective authorities, then much of the history of Native America, as perceived by Native Americans, is denied, and the properties reflective of that history are denied protection equal to that afforded properties of significance in the history of Euroamerican society.

In our experience, the Forest Service is particularly prone to questionable interpretations of the "religious property" criteria consideration. The most famous case of

this kind involved the San Francisco Peaks in Arizona, a property of deep cultural/religious significance to the Navajo and Hopi. The Forest Service, applying the National Register criteria considerations with the concurrence of the SHPO, determined that the Peaks were not eligible for the Register. Despite a court challenge to this determination and advice from both the Register and the Council that the question of eligibility should be referred to the Keeper of the National Register for a final determination, the Forest Service maintained its position. Other cases involving similar interpretations included the "GO-Road" case on the Six Rivers National Forest in California (where the property involved was eventually determined eligible for the Register and addressed under Section 106) and a still unresolved set of conflicts between Forest Service activities and Karuk Indian "World Renewal" ceremonial sites along the Klamath River in California.

To address these problems, and others less specifically associated with "religious" matters, we set about

to develop the referenced guidelines. The guidelines were distributed in draft to Federal agencies, SHPOs, Indian tribes, and other interested parties. A fairly large number of comments were received; the majority were positive, though many recommended specific changes. The two documents relied upon by the Forest Service in this case were among the most negative. Based on review of the comments, the Guidelines were extensively edited, but release of a final version has been delayed for reasons to be discussed below.

Of the two comment letters relied upon by the Forest Service, one is of marginal relevance at best. The letter of October 24, 1985 to then-Executive Director Garvey from the Director of the Bureau of Land Management merely expresses the BLM's position on the guidelines. This letter, and its extensive attachment, have been taken into account in our redrafting of the guidelines. However, since BLM is responsible for neither the National Register nor oversight of the Section 106 process, there is no reason to give its views any more weight than one would give the views

of any other agency--for example, those of the Forest Service.

The letter of August 16, 1985 from the Assistant Secretary of the Interior for Fish and Wildlife and Parks to then-Chairman Baker is more relevant, since the Assistant Secretary oversees the National Park Service, which maintains the National Register. Addressing this letter requires us to discuss the further history of "cultural values" guidelines.

We were surprised to receive the August 16 letter, particularly because it appeared to deny the recommendations contained in the then-recently published Cultural Conservation report[2], prepared by the Department of the Interior and the American Folklife Center pursuant to Section 502 of the National Historic Preservation Act

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[2]Published by the Library of Congress, American Folklife Center, 1983. The report addresses the protection of "intangible" aspects of culture as part of the overall national historic preservation program. Such aspects include a wide range of traditional cultural practices and beliefs, such as those of Native American groups that may be categorized as "religious."

amendments of 1980. We had relied on these recommendations in preparing the guidelines[3], and had assumed that we were in step with Interior in doing so, since when he transmitted the Cultural Conservation report to the President and Congress, Secretary Watt directed the National Park Service to undertake actions to implement its recommendations. Thus it came as a surprise to us when Assistant Secretary Horn effectively took the position that these recommendations should not be attended to until Congress took action on its own. The thrust of the Secretary's direction to the Park Service, and his advice to the President and Congress, had been to seek administrative means of carrying out the report's recommendations in lieu of new legislation[4]. It therefore seemed a bit disingenuous,

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[3]Especially a recommendation to include folklife and related traditional lifeways among the resources considered by Federal agencies in their planning activities.

[4]Letter of June 1(? - date obscured on our copy), 1983, from Secretary James Watt to the President; copy indicates similar letters sent to President of the Senate and Speaker of the House. Letter says: "new legislation is not needed," but recommends, among other actions, that State and

at best, for Assistant Secretary Horn to oppose the issuance of administrative guidelines because of a lack of legislative action. The Department of the Interior's representative on the Council at the time, however, Mr. Dale Lanzone, was successful in prevailing upon Chairman Baker to direct that the guidelines, for all practical purposes, be suppressed.

A few months after work on the guidelines had effectively ceased, both because of the Chairman's opposition to them and because of the press of other work, Mr. Lanzone requested a meeting with me to discuss the guidelines. At the meeting, he showed me a rough beginning draft of guidelines to be issued by the Department of the Interior to deal with traditional cultural properties. The draft was very similar to portions of our guidelines. Mr. Lanzone indicated that the Department was not in fact opposed to the issuance of such guidelines, but only felt, since they dealt substantially with matters pertaining to the

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Federal agencies be encouraged "to identify and document intangible cultural resource concerns."

eligibility of properties for inclusion in the National Register, that they should be issued by the National Park Service rather than by the Council. He asked that we work together in development of guidelines to be issued by the Park Service, and I agreed.

Mr. Lanzone subsequently worked on the guidelines with staff of the Park Service's Interagency Resources Division, in which the National Register is housed. Upon his departure to new employment with the General Service's Administration, the project lapsed for several months, but in the last several months it has been revived on the initiative of the National Register staff, and within a matter of days the National Register will be distributing for public comment a draft of National Register Bulletin 38, entitled Traditional Cultural Properties: Guidelines for Evaluation. Bulletin 38, in whose preparation I have personally participated, represents the culmination of Mr. Lanzone's initiative. It is my expectation that once it has been finalized, we will return to development of Council guidance

focussing on the consideration of traditional cultural properties in planning, as opposed to their identification and evaluation.

The purpose of this admittedly lengthy digression has been to show that the August 16, 1985 letter relied upon by the Forest Service did not reflect a fundamental difference of opinion between the National Register and the Council over how traditional cultural properties should be addressed; it merely reflected Interior's distaste for having the Council issue guidelines pertaining to its bailiwick--a distaste that has been alleviated through subsequent cooperative efforts by the Park Service and Council staff.

In conclusion: of the four documents relied upon by the Forest Service to support its interpretation of the National Register Criteria, two (the Service's interpretation as set forth in the Regional Director's responsive statement and the letter from the SHPO) represent glosses of the "religious property" criteria consideration that are not consistent with the National Register's own interpretation of

this consideration; one (the BLM letter) is simply a statement of opinion by another Federal land management agency; and one (the Horn letter of August 16, 1985) is an outdated expression of concern about what was perceived to be an inappropriate extension by the Council into the National Register's functions--a concern that did not affect how the National Register Criteria should be interpreted, and that in any event has since been resolved.

In applying the "religious properties" criteria consideration to properties used by Native American groups for traditional religious purposes, one has to balance carefully the need to avoid actions that would smack of the Constitutionally prohibited establishment of religion (the underlying reason for the "religious exclusion") and the need to avoid discriminating against a Native American group on religious or racial grounds. There is no evidence that in applying the criteria consideration in the Van Etten Exchange case, the Forest Service undertook any such careful balancing.

The Forest Service's efforts to identify traditional cultural properties

Although the Forest Service appears to have erred in assuming that the putative traditional religious significance of the 100 acre parcel involved in the Van Etten Exchange should not be considered as a possible basis for National Register eligibility, the Service did take certain steps to ascertain what the religious significance of the parcel might be. The question is, were those steps adequate to determine its significance?

The first thing the Forest Service did to address possible historic properties on the 100 acre parcel was to contract for a survey by Overland Associates of Boulder, Colorado. Overland's report of its survey, submitted in April of 1984, will be discussed in greater detail later. For the moment, it will suffice to note that:

- There is no evidence that Overland interviewed anyone who might have known about, or been concerned about, the

traditional cultural/religious significance of the parcel; and

- There is no evidence that Overland conducted any ethnographic study relative to the parcel, or even reviewed the ethnographic literature in more than a cursory, general fashion. Such data as they do present regarding traditional use of the area (cf. pp. 3-19, 3-20) is very general in nature, relating to the Black Hills as a whole.

Without study of the literature pertinent to traditional use of the area, and without talking to the people who might ascribe cultural/religious significance to it, or know about the ascription of such significance, it is obviously impossible to determine whether the area has such significance; traditional cultural properties do not announce themselves as such to the visitor. The Overland study was clearly insufficient as a basis for assessing the parcel's traditional significance.

When the significance of the 100 acre parcel became an issue, the Regional Archeologist inspected the parcel (on September 24, 1985 according to the memorandum of March 28, 1986 from the Regional Office to the Chief). There is no evidence, however, that the Regional Archeologist talked with anyone who might ascribe traditional cultural significance to the parcel, or know about such ascription, and there is no indication that the Regional Archeologist conducted any ethnographic research. Accordingly, his inspection only duplicated the efforts of Overland Associates, and not surprisingly supported Overland's conclusion.

On December 10-11, 1985, the Forest sponsored a conference with Native American spiritual leaders in Rapid City. Based on this conference, the Forest Supervisor states his opinion, in his memorandum of December 26, 1985 to the Regional Forester, that "the consultation required in the Van Etten land exchange appeal has been satisfactorily completed." However, the conference was not organized to

address the 100 acre parcel involved in the exchange, or to address any specific parcel. As the introductory remarks of the Deputy Forest Supervisor make clear (pp. 2-6 transcript), the conference was construed to be a general, introductory session aimed at establishing broad policy and procedures for future coordination on specific issues[5]. The tribal leaders, I believe, approached their participation in this manner. Having attended the conference, I can state with certainty that if anyone asked a question or made a statement about the Van Etten Exchange parcel, I didn't hear it. Apparently the Forest Supervisor's conclusion is based on "informal discussions with several of the conference participants," in which those participants did not identify the 100 acre parcel as an important "shrine or site" (Forest Supervisor's 12/26 memo, p. 2). The "informal discussions" are not documented in the transcript; we are

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[5]The intent, conduct, and conclusions of the conference are very adequately summarized in the undated, apparently draft, "Report on Black Hills National Forest Consultation with Indian Spiritual and Traditional Leaders" provided to us by the Forest Service.

not told with whom they were conducted, other than Charlotte Black Elk and David Spotted Horse, and we are not told what sorts of questions were asked, or how they were asked. Some of the Indian participants with whom I spoke during, before, and after the conference were afraid that the conference might be used against them, for purposes for which it was not intended. The December 26 memorandum is clear evidence that their suspicions were justified. Saying that the conference had satisfied the Forest Service's responsibilities regarding the Van Etten Exchange is like saying that one has satisfied one's Section 06 responsibilities on a specific case by attending a general meeting of the Advisory Council; it is at best ridiculous, at worst dishonest.

After the December conference, however, the Forest Service did take additional actions to determine the cultural/religious significance of the parcel involved in the Van Etten Exchange. On February 21, 1986 the Forest Supervisor wrote to the Tribal Councils of the area, and to

the individuals who had organized themselves at the December meeting as the "Black Hills Commission," to inquire about the significance of the parcel. The "Black Hills Commission" had specifically agreed to respond to Forest Service inquiries on, and advise the Forest Service about, matters of this kind. Although simply writing a letter to people is seldom a very good way to elicit useful information from Native Americans about traditional cultural properties, in this case it was a logical follow-up to the December meeting, and seems consistent with the understandings reached at that meeting. The letter is an excellent one; it is clear, concise, complete, respectful, and suggests specific, reasonable actions that might be taken to address the significance of the property.

Apparently there were only two responses to the Forest Supervisor's letter. One was from Mark Dewey Soldier Wolf of the Northern Arapahoe Tribe. On March 3 and 4, 1986, Gene Singsaas and Lee Sutton of the Forest met with Mr. Soldier Wolf and his daughter, and reviewed

the parcels involved in the Van Etten and other exchanges. According to Sutton's March 19, 1986 memorandum report of this meeting, Mr. Soldier Wolf "said he was gathering the information on the exchanges to take back to the tribal elders who might respond back to us later." The response apparently took the form of an invitation to meet with Northern Arapahoe business council members and elders; the Forest's Singsaas, Bob Adams, and Lance Rom took part in this meeting, on April 2-3, 1986. Singsaas' memorandum of April 17, 1986 provides a clear report of this meeting. The meeting seems to have been cordial, and productive in terms of general relations between the Forest and the Tribe regarding cultural matters. With regard to land exchanges, however, some communication failure seems to have occurred. Discussing the outcome of a session with 6 men whom I take to be elders of the Tribe, as opposed to members of the Business Council, Singsaas' memo (p. 3) says:

"The consensus of the group was that the Business Council was the appropriate organization to deal with proposed land exchanges in the Black Hills. They did not want to be involved with them. My personal belief is that they misunderstood the implications of the land exchange or they would have wanted to deal with the exchanges themselves. I think they thought that we were talking about exchanging National Forest lands for tribal lands in Wyoming."

The memo does not indicate that the elders had anything to say about the Van Etten Exchange parcel. Whether this indicates that the parcel held no significance for them, or that they felt that discussing the exchange would be an inappropriate intrusion into what they (mistakenly) took to be the Business Council's affairs, cannot be determined from the documents.

The other response to the Forest Supervisor's letter was from Charlotte A. Black Elk of Manderson, South

Dakota. There seems to be some controversy within the Forest Service over whether Ms. Black Elk should be regarded as a "traditional religious leader of the Lakota" (c.f. Forest Supervisor's memo to Regional Forester of April 14, 1986). Be this as it may, Ms. Black Elk is a member of the "Black Hills Commission," and as far as I know is highly respected by the Lakota and other tribes in the area for her concern about traditional cultural matters. Ms. Black Elk wrote a lengthy letter to the Forest Supervisor on February 28, 1986. Regarding the Van Etten Exchange, she says:

> **"I conducted a personal walk-over survey of the sites, and feel that the exchange should occur."**

Ms. Black Elk specifies several reasons for her conclusion. These are:

- **"benefit in acreage to public land holdings;"**
- **"consolidation of public lands;" and**
- **"greater degree of land protection."**

These are all probably excellent reasons for proceeding with the exchange, but they do not directly

address the question of the parcel's traditional cultural significance. I can easily imagine the Section 106 process resulting in agreement that the exchange should proceed, for precisely the reasons specified by Ms. Black Elk, whatever the cultural significance of the parcel, but the fact remains that the significance of the parcel needs to be defined. Ms. Black Elk seems to be skipping this step and going on to advise about ultimate management decisionmaking.

Ms. Black Elk goes on to say that:

> **"The site selected by Van Etten for exchange has generated several very emotional telephone calls to me from landowners/tenants surrounding the site. There have been a wide range of comments from the site being 'sacred burial grounds' to allegations that the site will be opened to massive, and environmentally adverse, development. However, I think it is necessary to rescind from issues of personal emotion and view the proposed exchange from the vantage point of an overall strategy for**

public land holdings in the Black Hills National Forest."

Two observations are relevant to this statement. First, it again illustrates Ms. Black Elk's desire to transcend questions of the particular significance of specific sites and participate in general land-use decisionmaking. This may be a very appropriate thing for her and others to do, and in fact may be more in keeping with traditional Lakota cultural practice than is the identification and protection of specific properties--after all, the Lakota tend to identify the Black Hills as significant in their entirety. It might be very useful, as a matter of programmatic coordination between the Forest and the tribes, to explore ways that they could participate in the manner evidently desired by Ms. Black Elk, in lieu of arguing about specific sites. At the moment, however, we are addressing the specific significance of a particular parcel of land, and Ms. Black Elk's beliefs about a proper "overall strategy" are not informative about this issue.

The second observation, however, is that--based on reading between the lines of Ms. Black Elk's letter--one gets the strong impression that she is not very impressed by the allegations of the "landowners/tenants." I assume that at least some of these are Mr. Ellison's clients. Ms. Black Elk's view of the parcel's significance is suggested by her enclosure of the words "sacred burial grounds" in quotation marks, and is underscored by the following paragraph, which seems to indicate that she suspects the "landowners/tenants" of having ulterior motives for their allegations:

> **"I am particularly concerned that, because many of the residents use the proposed selected site as a personal park and private recreation area, that the religion of the Lakota will be used to manipulate and side-track the principle of consolidating areas."**

One can easily reach two rather different conclusions from this statement. First, one can conclude that Ms. Black Elk regards the parcel as having no cultural/religious significance, and feels that Mr. Ellison's clients are misusing

Lakota religion to preserve their access to a "personal park and private recreation area." Alternatively, one can conclude that whether the area has cultural/religious significance or not, Ms. Black Elk feels that the "principle of consolidating areas" should take precedence. These conclusions, of course, are not altogether mutually exclusive. I tend to think that an accurate reading would be that Ms. Black Elk isn't personally aware that the parcel has any specific traditional cultural/religious significance; that she is suspicious of the motives of Mr. Ellison's clients; and that she believes that it is in the public interest to proceed with the exchange, based on her beliefs about proper land-use principles.

In conclusion: the Forest Service's efforts to determine the traditional cultural significance of the 100 acre parcel involved in the Van Etten Exchange have yielded rather muddled results. The Forest Supervisor's effort to misuse the December 10/11, 1985 conference results was reprehensible, and if those subsequently consulted were

aware of it, may have gotten the whole effort off on the wrong foot. The Forest Service did make what seems to have been a good-faith effort to consult with members of the "Black Hills Commission," but got little response. This may reflect little knowledge of or concern about the cultural/religious value of the parcel on the part of the Commission members, but on the other hand it may reflect the fact that the Commission was newly organized and uncertain about procedures. It may also reflect suspicion on the part of Commission members that whatever they said might be misused--a suspicion that would have been enhanced by any knowledge they may have had of the Forest Supervisor's misconstruction of the results of the December 10-11, 1985 conference. Of the two responses received, neither indicated that the parcel proposed for exchange had special cultural/religious value. However, one of the responses--that of Mark Dewey Soldier Wolf and the Northern Arapahoe elders--seems to have reflected confusion about what was being addressed, while the other--

that of Charlotte Black Elk--seems to have reflected greater concern for overall land use principles than for the specific significance of the property involved. While neither response indicates that the parcel has specific cultural/religious significance, neither unambiguously indicates that it does not. It may be too much to expect an unambiguous result from consultation with traditional spiritual leaders of a Native American group, particularly in the emotionally charged atmosphere that surrounds Forest Service management of and tribal beliefs about the Black Hills, but the fact remains that at this point this reviewer, at least, is left without a significant clue about whether the claims of Mr. Ellison's clients have any merit. Although the Forest Service has made a real effort to address this question, through its consultation with the Black Hills Commission, it appears that more effort is needed to overcome (a) the uncertainty resulting simply from the newness of the Commission, and (b) the likely effects of the

Forest's efforts to misuse the results of the conference at which the Commission came into being.

Was the Forest's effort to identify historic properties in general adequate and appropriate?

The adequacy and appropriateness of the Forest's overall effort to identify historic properties of all kinds can be addressed only with reference to the April, 1984 report of its archeological contractor, Overland Associates, since this is the only document that describes the effort in detail. As noted above, the Regional Archeologist subsequently examined the parcel, but there is no documentation as to what was involved in this examination.

The Overland report, entitled Cultural Resources Inventory of the Van Etten Exchange, is a remarkable document. Only the first and last two pages of text (pages 1-1, 1-2, 5-1, and 6-1) appear to be specific to the parcel inspected; all the rest--eight pages on the "area and environment," twenty-three pages on "cultural overview," and

fourteen pages on "research orientation and project methodology" are general in nature, addressing the Black Hills overall and/or what appears to be standard Overland field methodology. It is very probable that the bulk of the report is maintained as a standard set of files in Overland's word processor and punched into every report Overland prepares on the Black Hills. This creates some startling discontinuities. On page 4-11, for example, one reads that inventory and site record forms "are completed at each prehistoric and historic site found;" on page 5-1, however, it is reported that "no sites were encountered during the present survey." A lengthy discussion of "collection policy" is provided on pages 4-12/13, but apparently nothing was found that might have been collected. More significantly, we are never really told anything about the parcel inspected, about specific observations made while there, about any particular difficulties encountered during survey, or about specific results. If it were not for the photographs appended to the report, there would be little evidence that the authors had

even visited the parcel. In short, the report is mostly padding.

The report's great lack of specificity is particularly germane to the claims of Mr. Ellison's clients that there are an important cave and a quarry on the parcel. There is no evidence that Overland undertook any specific review of the parcel's geology, which might have revealed likely cave sites. Nor is there any evidence that Overland reviewed the history of the parcel and its vicinity themselves, which might have provided evidence for the existence or nonexistence of the quarry. The sources cited in the "cultural overview" section are all very general in nature, and there is no indication that local histories, newspaper records, historical society archives, atlases, or other standard sources of historical information were consulted. The text is internally inconsistent about what sources of information actually were checked; on pages 4-10 and 4-11, in one of the general, apparently "canned" sections, we are told that a number of sources (not including local historical sources, ethnographies, etc.) were reviewed,

but in the apparently de novo Section 5-1 only two sources are listed: the records of the Archeological Research Center at Fort Meade and the "Cultural Atlas" of the Black Hills National Forest itself--in other words, the basic archeological site inventories maintained by the SHPO and the Forest Service. These sources, we are told, revealed only that no surveys had been conducted in the area, and no archeological sites found.

The report is entirely archeological in its orientation; on page 4-1, for example, the significance of historic properties (referred to as "cultural resources") is discussed solely in terms of significance in archeological research. Perhaps it is because of this bias that, as noted above, there is no evidence that anyone with knowledge of or interest in the putative traditional cultural value of the parcel was contacted or interviewed, that the ethnographic literature was reviewed in more than the most cursory way, and that the history of the area seems to have been slighted. The authors' at best vague familiarity with what in theory they

were contracted to identify is further elucidated by section 4.2 on pages 4-5 through 4-8, where a set of "National Register Criteria," wholly archeological in nature, are set forth, in apparent ignorance of the actual Criteria published at 36 CFR §60.4.

It is also notable that no subsurface testing was carried out as part of the survey (cf. p. 4-11), despite the fact that surface visibility conditions were characterized as "poor to fair." In a letter dated January 16, 1986 to the Forest Service's Paul Zimmerman, Overland's Jeff Campbell explains various steps that were taken to compensate for poor surface visibility. These do not appear unreasonable, and might in fact make subsurface testing unnecessary depending on local circumstances, but is difficult to imagine why, according to Campbell, such steps "are not generally made explicit in reports" (p. 2). Moreover, the report is not simply inexplicit about these steps, it seems to contradict Campbell's description of them; on page 4-10, we are told that "an alternative plan was adopted which concentrated

survey on the high potential and high visibility areas..." Again, however, we are given no parcel-specific data about which areas were inspected in detail or which areas were perceived to have "high potential." One's uncertainty about the applicability of the methodological description to the actual parcel under consideration is heightened by the fact that on the same page, the area is referred to as a "timber sale" (p. 4-10, line 4).

Finally, the report's focus solely on lands within the boundaries of the 100 acre parcel proposed for exchange may have been inappropriate. If private use and development of the parcel may result in the kind of environmental impacts that nearby landowners and tenants fear according to Ms. Black Elk's letter, then effects on historic properties may occur outside the boundaries of the parcel itself. For example, if the parcel is developed for housing, one can easily imagine this stimulating the excavation of nearby archeological sites (if any exist) by new residents interested in artifact collecting. As specified in 36

CFR §800.4(a), efforts to identify historic properties should address an undertaking's area of potential effects, which may be larger (or smaller) than the project area per se.

Its narrow focus, the lack of evidence of background research, the bias toward only one class of historic properties, the inexplicit methodology employed, and its internal contradictions make the adequacy of the Overland Report dubious at best. It should not be relied upon as a basis for decisionmaking about the presence or absence of historic properties on the parcel or within the exchange's area of potential effects.

Conclusions and recommendations

Based on the information provided by both Mr. Ellison and the Forest Service, we are unable to reach any conclusions about whether historic properties are likely to occur on the 100 acre parcel proposed for transfer out of Federal ownership. Mr. Ellison's clients insist that the parcel has traditional cultural value, and that there are at

least a quarry and a cave on or near the parcel that may be eligible for inclusion in the National Register for other reasons. The Forest Service denies the first allegation, but its efforts to investigate its basis have yielded ambiguous results, and are flawed by poor methodology and apparent bias. The Forest Service has indicated, in its letter of June 30 to us, that it will perform additional studies with respect to the second allegation.

The Forest Service should cause additional study to be carried out by an expert and unbiased third party to address the allegation that the parcel has traditional cultural significance. An excellent model for such a study is that carried out for the Six Rivers National Forest in California addressing the significance of the Helkau Historic District, site of the famous "G-O Road" case.

The Forest Service should also ensure that the additional study it intends to carry out addressing the claims about the cave and quarry is consistent with pertinent regulations and guidelines, such as 36 CFR §800.4(a), the

Secretary of the Interior's Standards an Guidelines for Identification, and National Register Bulletin 24: "Guidelines for Local Surveys." The deficiencies in the Overland Report, discussed above, should be specifically addressed and corrected.

The Forest Service should ensure that all studies address the entire area of potential effects (36 CFR §800.2(c)) of the proposed exchange. Depending on the uses to which the 100 acre parcel may be put if the exchange proceeds, this are may extend beyond the boundaries of the parcel itself.

Finally, the Black Hills National Forest is to be commended on its efforts to develop an ongoing working relationship with the tribes of the area, through the "Black Hills Commission." It is unfortunate, however, that the Forest Supervisor chose to misuse the results of the conference at which the Commission was formed, as discussed above. The Forest Service should undertake the actions necessary to strengthen its relationship with the

Commission, to ensure that both the Forest and the Commission members fully understand the Commission's purposes and procedures, and to use it effectively and properly in the review of future undertakings. As noted above, it may be that the role apparently desired for the Commission by Charlotte Black Elk--that of participating in land-use decisionmaking without assessing the specific cultural significance of particular parcels--may be a more fruitful role than that of assessing the significance of parcels. It may be wise to explore this approach in detail with commission members, but in any event, the Forest Service should ensure that both the Commission and its own employees are clear in their minds about the Commission's functions and operations.